

THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS,  
1871-1872

By

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The South Carolina Ku Klux Klan trials demonstrate the difficulty of implementing the Fourteenth and Fifteenth Amendments. White South Carolinians, reacting from a threat to their honor, instituted in the upcountry a reign of terror which brought increasingly strong federal measures to enforce the Reconstruction Amendments. President Grant, for example, suspended habeas corpus in the upcountry.

The subsequent trials became a political forum for constitutional experimentation as both prosecution and defense struggled to breathe life into the ambiguous phrases of the Fourteenth and Fifteenth Amendments. The prosecution argued for a broad nationalization of civil right, including the incorporation of the Second and Fourth Amendments through the Fourteenth, a positive right to vote, the ability of the federal government to protect the freedmen

from individual discrimination as well as state action, and the right to attach ordinary common law crimes to federal offenses. The defense countered with a narrow, states' rights interpretation which insisted that the Fourteenth Amendment had not changed federal-state relations, that the Fifteenth Amendment did not create a positive right to vote, and that the federal government could protect the freedmen only in cases of official state rather than private action.

Although the two-headed federal circuit court in South Carolina interpreted the Constitution in a manner which allowed successful prosecution in case after case, the judges refused to embrace any fundamental changes in the constitutional system. Thus a federal bench locked into traditional notions of dual federalism blocked the development of substantive federal rights. Attorney General George Williams deliberately obstructed the Supreme Court from ruling on the same issues in U.S. v. Avery, then sabotaged federal enforcement efforts in U.S. v. Cruikshank. As the Grant Administration and the nation lost interest in the freedmen, the Supreme Court followed suit, rendering an interpretation which left the federal system basically unaltered by the Reconstruction Amendments. Therefore, the task of developing constitutional doctrines and a rule of law strong enough to protect the rights of black citizens awaited a future generation.

## CHAPTER 1 INTRODUCTION

The meaning of the Reconstruction Amendments--particularly the Fourteenth--and the precise intentions of their framers are subjects which have engaged debate among legal scholars, historians, and judges from the time the amendments were written to the present. Lacking in clarity and ambivalent in purpose, the Fourteenth Amendment has been subjected to numerous interpretations. Some scholars have considered the Reconstruction Amendments to be such a radical departure from the antebellum constitutional system that they can be considered a "Second American Constitution."<sup>1</sup> Historians who take such a broad nationalistic view insist that they were intended to confer positive rights, despite their negative wording. The Fourteenth Amendment granted equality, applied the Bill of Rights to the states, provided ample authority to prohibit racial segregation, and even protected blacks from private discrimination as well as state action. Congress had plenary power to enforce civil rights. Should a state fail

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<sup>1</sup>John P. Frank and Robert J. Munro, "The Original Understanding of 'Equal Protection of the Laws,'" Columbia Law Review 50 (February 1950): 134.

to protect its citizens and provide basic rights, the federal government could place itself squarely between the citizens and the state.<sup>2</sup> Diametrically opposed to this position is Michael Les Benedict's argument that constitutional changes and indeed the entire Republican Reconstruction effort "led to the restoration of a federal system virtually as it was."<sup>3</sup> Many historians who hold such a conservative opinion of the constitutional changes wrought by Reconstruction contend that the Fourteenth Amendment was never meant to incorporate the Bill of Rights, interfere with state voting laws, or affect school segregation.<sup>4</sup>

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<sup>2</sup>See for example, Horace E. Flack, The Adoption of the Fourteenth Amendment (Baltimore: Johns Hopkins Press, 1908); Judith A. Baer, Equality Under the Constitution: Reclaiming the Fourteenth Amendment (Ithaca, N.Y.: Cornell University Press, 1983); Robert J. Kaczorowski, "Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction," New York University Law Review 61 (1986): 863; Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Departments of Justice and Civil Rights, 1866-1876 (New York: Oceana, 1985); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (Durham, N.C.: Duke University Press, 1986).

<sup>3</sup>Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," Journal of American History 61 (June 1974): 65-90. See also A Compromise of Principle: Congressional Republicans and Reconstruction, 1863-1869 (New York: Norton, 1974).

<sup>4</sup>Alexander M. Bickel, "The Original Understanding and the Segregation Decision," Harvard Law Review, 69 (1955); Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," Stanford Law Review 2 (December 1949): 5-139; Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (Cambridge, Mass.: Harvard University Press, 1977).

Despite these vast differences of interpretation, the main source of evidence for both schools of thought has been the Congressional debates. Clearly the evidence is contradictory.

Historians who have looked beyond the debates have tended to find additional evidence for a broad interpretation of the Fourteenth Amendment. Jacobus ten Broek and Howard J. Graham linked the Reconstruction Amendments to Abolitionist constitutional theory finding there the evidence that the framers intended the Reconstruction Amendments to revolutionize the federal system. The Thirteenth Amendment for ten Broek and Fourteenth for Graham declared and confirmed preexisting rights thereby establishing what had always been the "true" meaning of the Constitution.<sup>5</sup>

William E. Nelson, building on the work of Harold Hyman, suggested that the Republicans who framed the Reconstruction Amendments were committed simultaneously both to the protection of black rights and the continuation of the traditional federal system. This insight makes both

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<sup>5</sup>Jacobus ten Broek, The Antislavery Origins of the Fourteenth Amendment (Berkeley: University of California Press, 1951) pp.184-7; Howard J. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism (Madison, Wisc.: State Historical Society, 1968), pp. 304-309.

sides of the Constitutional debate partially correct.<sup>6</sup> The Fourteenth Amendment, according to Nelson, was a statement of moral principles "designed to persuade people to do good" rather than an attempt to establish precise legal rules. The framers never agreed among themselves exactly what the Amendments would accomplish. When the commitment to equality embodied in the Fourteenth Amendment inevitably conflicted with the devotion to local authority, the Supreme Court was forced to define its content. Thus scholars who search for the framers' intentions regarding voting rights, segregation, or the application of the Bill of Rights to the states are looking for answers to questions that were never completely resolved.<sup>7</sup>

The debate among legal historians is a part of a more general debate about the nature of Reconstruction and the reasons it failed to establish and maintain a rule of law sufficient to protect the four million freedmen in their civil and political rights. Early historians of the Dunning school considered Reconstruction an ill-conceived, vindictive plot to punish the penitent Southerners. Since blacks were inherently inferior, they were unworthy of

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<sup>6</sup>William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine (Cambridge, Mass.: Harvard University Press, 1988), pp. 8-12; Harold M. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution (New York: Alfred A. Knopf, 1973), pp. 435-36.

<sup>7</sup>Nelson, Fourteenth Amendment, pp. 8-12.

constitutional rights.<sup>8</sup> James Ford Rhodes wrote from a nationalistic perspective, but his conclusions were remarkably similar to those of Dunning and his students. Radical Republicans, carpetbaggers, and scalawags were the villains in both accounts. Political expediency rather than humanitarianism explained Republican support for black rights.<sup>9</sup> The Dunning School interpretation stood until Revisionist historians began in the 1930s to write a more balanced account of Reconstruction. Even in the early revisionist work, however, Republicans were still vindictive, if less villainous, and the freedmen remained inferior beings, although they deserved humanitarian effort.<sup>10</sup>

The heroes and villains of Reconstruction exchanged places in the work of the neorevisionist historians of the 1960s. The vindictive Radical Republicans became idealistic statesmen determined to secure a fundamental equality of

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<sup>8</sup>See William Archibald Dunning, Essays on the Civil War and Reconstruction and Related Topics (New York: Macmillan, 1904); for South Carolina see John S. Reynolds, Reconstruction in South Carolina, 1865-1877 (Columbia, S.C.: State Publishers, 1905).

<sup>9</sup>James Ford Rhodes, History of the United States, 1850-1909, 9 vols. (New York: Macmillan, 1906), 6: passim.

<sup>10</sup>The most important revisionist study is James G. Randall, The Civil War and Reconstruction (Boston: D.C. Heath, 1939). See also Francis B. Simkins, "New Viewpoints of Southern Reconstruction," Journal of Southern History 5 (February 1939): 49-61. The standard revisionist account of Reconstruction in South Carolina is Francis B. Simkins and Robert H. Woody, South Carolina During Reconstruction (Chapel Hill: University of North Carolina Press, 1932).

rights for the freedmen. Not all Republicans were Radicals, however, and racism caused unfortunate division in Republican ranks. Reconstruction, alas, was not radical enough. Driven by their strong sense of racial injustice, the neorevisionists put the status of the freedmen at the heart of the Reconstruction problem; civil rights was the most important issue. Constitutional provisions failed to provide long term protection for black rights, because Republicans lacked the commitment to enforce them in the face of Southern intransigence, Northern exhaustion, and racism everywhere.<sup>11</sup> Subsequent historians have added to the neorevisionist interpretation their insistence that Reconstruction failed because Republicans refused to give the freedmen the anticipated "forty acres and a mule." Without the gift of land, according to this interpretation, blacks could never achieve the independence needed to make freedom meaningful.<sup>12</sup>

Constitutional historian Herman Belz disagreed strongly with this "new orthodoxy." Republicans never seriously

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<sup>11</sup>William R. Brock, An American Crisis: Congress and Reconstruction, 1865-1867 (London: Macmillan, 1963); LaWanda Cox and John H. Cox, Politics, Principle, and Prejudice, 1865-1866 (Glencoe, Ill.: Free Press, 1963); Kenneth M. Stampp, The Era of Reconstruction, 1865-1877 (New York: Random House, Vintage Books, 1965); James M. McPherson, The Struggle for Equality: Abolitionists and the Negro in Civil War and Reconstruction (Princeton, N.J.: Princeton University Press, 1964).

<sup>12</sup>See for example Allen W. Trelease, Reconstruction: The Great Experiment (New York: Harper & Row, 1971).

considered wholesale redistribution of private property, according to Belz, and historians have failed to consider the legal implications involved. For Belz the most important issue of Reconstruction was not the freedman, but the restoration of the Confederate states to the Union. Confirming emancipation and integrating the blacks into society were secondary. Judged by the standards of the time, Belz considered Reconstruction "more success than failure." The historians' tendency to impose present day racial standards on the nineteenth century Belz considered unhistorical.<sup>13</sup>

Historians who have blamed the Republican government for the failure of Reconstruction efforts to secure equal status for black citizens have failed to understand the depth of Southern resistance. Proslavery theory had persuaded most white Southerners that blacks were innately inferior, bestial by nature, and destined by Divine Providence to serve forever as the mudsill class. Blacks were docile and childlike when kept in bondage, but extremely dangerous in a free condition.<sup>14</sup> A combination of racism and fear convinced whites that their lives depended

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<sup>13</sup>Herman Belz, Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era (New York: W.W. Norton, 1978), pp. 143-49; Herman Belz, "The New Orthodoxy in Reconstruction Historiography," Reviews in American History 1 (March 1973): 106-13.

<sup>14</sup>Drew Gilpin Faust, The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1839-1860 (Baton Rouge: Louisiana State University Press, 1981), pp. 1-20.

upon strict racial control. Radical Reconstruction threatened the very essence of Southern civilization; thus white Southern hostility to federal efforts to elevate the former slaves was constant throughout the Reconstruction period. The Ku Klux Klan, a terrorist organization which operated in most of the former Confederate states following the election of 1870 and sustained a wave of violence which lasted for months in upcountry South Carolina, was only the most violent manifestation of the South's grim determination to resist equal rights for the freedmen at any cost.

Early historians of the Klan promoted the organization as a heroic institution altogether necessary for protecting white womanhood and keeping the bestial blacks under control.<sup>15</sup> Revision inevitably set in, however, and the Klan lost the romantic reputation promoted by the School of the Lost Cause. Francis Simkins probed the depths of Klan crime but insisted--contrary to his own evidence--that the Klan was less important than previously believed and that the lower class whites participated in Klan outrages.<sup>16</sup>

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<sup>15</sup>The most familiar account is Thomas Dixon's novel, The Clansman, immortalized in D. W. Griffith's film Birth of a Nation (1914). On South Carolina see Reynolds, Reconstruction in South Carolina, pp. 179-90; Henry W. Thompson, Ousting the Carpetbaggers from South Carolina (R.L. Bryan: Columbia, S.C., 1926), pp. 53-54.

<sup>16</sup>Francis B. Simkins, "The Ku Klux Klan in South Carolina," Journal of Negro History 12 (October 1927): 606-47; Francis B. Simkins and Robert H. Woody, South Carolina During Reconstruction (Chapel Hill: University of North Carolina Press, 1932), pp. 457-61.

Historians have now recognized that Southerners of all classes participated in the violence, but there has been no consensus on the motives which prompted the Klan's brutality. The Klan functioned on several different levels and committed many different kinds of crime; Klansman meted out punishment for voting the Republican ticket, for owning a gun, for impudence, for poor work habits, for sexual offenses, arson, and thievery. Historians in ascribing motive have typically ignored the evidence which did not fit their theories and emphasized what did. Historians of the 1960s and 1970s emphasized racism as the motive for Klan violence; Herbert Shapiro's work on the South Carolina Klan exemplified this approach.<sup>17</sup> While racism is undeniably an important part of Klan motive, the racial argument failed to account for attacks on white citizens and finessed the problem of class differences among whites. Class conscious historians like J.C.A. Stagg have emphasized land tenure disputes and labor contract problems in areas where gang labor was giving way to share and rental agreements as the basis for Klan activity. This class approach, however, failed to account for the prevalence of violence in the hill country of South Carolina where plantations were rare and the lack of violence in other areas which were in a similar

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<sup>17</sup>Herbert Shapiro, "The Ku Klux Klan during Reconstruction: The South Carolina Episode," Journal of Negro History 49 (January 1964): 34-55.

state of transition.<sup>18</sup> Allen Trelease, in the most extensive analysis of the Klan to date, contended that the Klan was a political organization, the "terrorist arm of the Democratic Party."<sup>19</sup> Most Klan outrages were in fact committed against Republicans. Joel Williamson, however, concluded that politics had little to do with Klan violence in South Carolina, since the violence erupted after the election of 1870. Williamson emphasized the presence of an armed black militia as the spark which ignited the Klan.<sup>20</sup> Each of these arguments explained some but not all of the Klan violence.

Charles L. Flynn in his work on the Georgia Klan has suggested a more holistic approach to the problem of Klan violence. It was caste rather than race or class, according to Flynn, which bound the Klan together. Caste was racism and more; caste determined the "terms of conflict among whites" as well as the conflict between the races. The Klan was a folk movement or vigilante force, comparable to the

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<sup>18</sup>J.C.A. Stagg, "The Problem of Klan Violence: The South Carolina Upcountry, 1868-1871," Journal of American Studies 8 (December 1974): 303-20.

<sup>19</sup>Allen W. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction (New York: Harper and Row, 1971), p. xvii.

<sup>20</sup>Joel Williamson, After Slavery: The Negro In South Carolina During Reconstruction, 1861-1877 (Chapel Hill: University of North Carolina Press, 1965), p. 261. Reynolds similarly emphasized the importance of the black militia to organization of the Klan. Reconstruction in South Carolina, pp. 182-84.

European charivari ("shivaree" in the South), whereby masked demonstrators punished offenders and reaffirmed community values.<sup>21</sup> Flynn's emphasis on community standards as the explanation for the Klan covered all the various kinds of crime committed by the nightriders and works as well for South Carolina as well as it does for Georgia.

The great South Carolina Ku Klux Klan Trials of 1871 and 1872 present a unique opportunity to observe the dynamics of federal efforts to enforce the Fourteenth and Fifteenth Amendments in opposition to the white South Carolinians' unwavering determination that the traditional Southern social values and political norms would not yield. Resistance to Reconstruction was nowhere stronger than in upcountry South Carolina where nightriders had terrorized black citizens almost nightly over a period of several months in 1870 and 1871, forcing the freedmen to sleep in the woods and swamps for fear of their lives. Powerless to protect the citizens of his state, carpetbag Governor Robert K. Scott turned to President U.S. Grant for assistance.

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<sup>21</sup>Charles L. Flynn, Jr., "The Ancient Pedigree of Violent Repression: Georgia's Klan as a Folk Movement," in The Southern Enigma: Essays in Race, Class, and Folk Culture, ed. Walter J. Fraser, Jr. and Winfred B. Moore, Jr. (Westport, Conn.: Greenwood Press, 1983), p. 189-90. On the charivari see Bertram Wyatt-Brown, Southern Honor: Ethics and Behavior in the Old South (New York: Oxford, 1982), pp. 440-42; Natalie Z. Davis, "The Reasons of Misrule," in Society and Culture in Early Modern France (Stanford: Stanford University Press, 1975), pp. 97-123; on vigilante justice see Richard Maxwell Brown, Strain of Violence: Historical Studies of Violence and Vigilantism (New York: Oxford, 1975).

Grant suspended the writ of habeas corpus in a nine county area. Grant's action--unprecedented in the United States in peacetime--facilitated mass arrests of Klan terrorists and enabled the federal government to bring many of them to justice. The South Carolina trials represent the national government's most determined effort to enforce constitutional amendments and federal statutes as a means of changing the overall social and political structure of the South.

Despite the national importance of the trials, recognized and duly reported in newspapers around the nation at the time, they have been the focus of little scholarly attention. John S. Reynolds of the long discredited Dunning School insisted in Reconstruction in South Carolina that Republicans had unfairly imposed martial law on a profoundly peaceful South Carolina. Reynolds considered the trials entirely a matter of political vengeance on the part of the Republican government. Reynolds' conclusions are marred by his blatant racism, but they merit attention, nonetheless. Kermit Hall in an article for the Emory Law Journal has reemphasized the political nature of the trials, ignored or rejected by intervening scholars, as an effort of Republicans to mete out political justice to their Democratic opponents and assure the continued strength of the primarily black Republican Party in the South. Constitutionally speaking, Hall found that the trials did

little, if anything, to enhance the rights of black citizens. Hall's conclusion contrasts sharply with that of Robert Kaczorowski who considered the South Carolina trials a victory for the nationalistic goals of the Republican Party.<sup>22</sup> Allen Trelease and Everette Swinney have treated various aspects of the trials, generally agreeing that the trials effectively curbed Klan outrages, enhancing black freedom temporarily.<sup>23</sup> No full scale analysis of the Klan trials has been written to date.

A deeper understanding of the South Carolina Ku Klux Klan trials will help to explain why the best efforts of the Republican government failed to secure constitutional doctrines and a national rule of law strong enough to secure the four million freedmen in their civil and political rights. To understand the undeniably partisan goals of the Republicans in prosecuting the Ku Klux Klan, which Hall has demonstrated, does not necessarily diminish the Party's

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<sup>22</sup>Kermit L. Hall, "Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872," Emory Law Journal 33 (Fall 1983): 921-51. See also Kermit L. Hall and Lou Falkner Williams, "Constitutional Tradition Amid Social Change," Maryland Historian 16 (Fall/Winter 1985): 43-58; Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, The Department of Justice, and Civil Rights, 1866-1876 (New York: Oceana Press, 1985), pp.127-31.

<sup>23</sup>Everette Swinney, "Suppressing the Ku Klux Klan: The Enforcement of the Reconstruction Amendments, 1870-1877(Ph.D. dissertation, University of Texas, 1966), pp. 233-37, Trelease, White Terror, p. 415; Joel Williamson, After Slavery: The Negro in South Carolina During Reconstruction, 1861-1877 (Chapel Hill: University of North Carolina Press), p. 266.

efforts to establish genuine constitutional protection for the freedmen's rights. Without a strong Republican Party in the South, the interests of the former slaves were destined to be forgotten in the political process as the restoration of home rule in South Carolina in 1877 demonstrated. The Klan trials showcased the constitutional goals of the Radical Republicans in conflict with traditional ideas of state sovereignty and dual federalism retained by the white South and indeed by many members of the Republican Party as well. The dynamics of the legal process in South Carolina demonstrated the deep divisions within the nation over the meaning and scope of the Reconstruction Amendments, and proved the difficulty of implementing ambiguous national policy in conflict with the unflinching localism of white South Carolina. If the Ku Klux Klan trials secured numerous convictions, they nonetheless failed to effect legal changes drastic enough to change the minds and hearts of white South Carolinians steeped in the tradition of white supremacy.

The Civil War brought poverty and shame to South Carolina, but defeat never convinced white South Carolinians that slave labor had been wrong. Nor did it persuade the whites that a reevaluation of their racial attitudes was inevitable. The white population had determined ever since emancipation that whatever freedom might mean for their slaves, it did not confer on the freedmen the status of equality. "The Master he says we are all free," one South

Carolina freedman reported, "but it don't mean we is white."<sup>24</sup> The enormous physical, emotional and economic hardships caused by war in South Carolina actually hardened racial attitudes among the whites and diminished whatever paternalism had endeared the slaves to their masters and protected them from the other whites.<sup>25</sup> Whites felt betrayed when "their" people deserted the plantations to find freedom in the trail of the Union Army. It was a shock beyond their understanding that the blacks did not plan to stay in their place and behave like slaves. If the masters were as benevolent to the slaves as their own proslavery rhetoric had convinced them they were, surely the blacks had no need to be free. To make matters worse, defection was more prevalent among the favored domestic slaves than among the field hands. Defeat and the end of slavery came as a double shock to white South Carolinians; many simply could not believe that the United States Government stood ready to enforce emancipation. Accordingly many of the stunned masters delayed reporting the new status to the blacks, hoping somehow a miracle would occur and things would go on

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<sup>24</sup>Quoted in Leon F. Litwack, "The Ordeal of Black Freedom," in The Southern Enigma: Essays on Race, Class, and Folk Culture ed. Walter J. Fraser, Jr. and Winfred B. Moore, Jr. (Westport, Conn.: Greenwood, 1983), p. 7.

<sup>25</sup>George M. Fredrickson argued that paternalism was never strong in South Carolina; racism was always the stronger force in the state. "Masters and Mudsills: The Role of Race in the Planter Ideology of South Carolina," South Atlantic Urban Studies 2 (1978): 34-38.

as before the War. When the slaves inevitably learned that their bondage had ended, whites resolved to perpetuate a system as nearly like slavery as possible.<sup>26</sup>

Having long understood free blacks to be dangerous to their society, whites considered a strict system of racial control to be absolutely mandatory to the new order of things. Conjuring up the specter of a bloody racial war, South Carolinians rushed to institute the infamous Black Code of 1865. South Carolina's Black Code severely limited the freedom of the newly freed slaves. No black could aspire to any occupation other than farmer or servant without obtaining a license and paying a special tax. The old patrol laws were reinstated; blacks were required to make contracts, work from sunup to sundown, and obtain permission before leaving the premises or entertaining visitors. No black could join the militia or keep a weapon. Vagrants--unemployed freemen--were to be severely punished.<sup>27</sup>

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<sup>26</sup> Leon Litwack, "Ordeal of Black Freedom," p. 9; James L. Roark, Masters Without Slaves: Southern Planters in the Civil War and Reconstruction (New York: Norton, 1977), pp. 84-85, 94-95, 106-7; Williamson, After Slavery, pp. 32-35; David H. Donald, "A Generation of Defeat," in From the Old South to the New: Essays on the Transitional South, ed. Walter J. Fraser, Jr. and Winfred B. Moore, Jr. (Westport, Conn.: Greenwood, 1981), pp. 7-11.

<sup>27</sup> Williamson, After Slavery, pp. 72-3; Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877 (New York: Harper and Row, 1988), p. 200; Simkins and Woody, South Carolina During Reconstruction pp. 48-50.

White South Carolinians established the Black Code in order to reestablish order and perhaps even, as both Joel Williamson and Simkins and Woody have suggested, to protect the freedmen. The laws demonstrated, nonetheless, the white Southerners' fundamental assumption that the blacks were inherently, immutably inferior to whites. If the freedmen needed protection, it was because they were a race of children who were incapable of reaching a civilized state. The black codes suggested even more the white population's profound fear of the freedmen; white South Carolinians had maintained a state of paranoia over the possibility of slave insurrection for so long that they were convinced free blacks would rise in retaliation against their ex-masters. Locked into their traditional assumptions concerning the freedmen, South Carolinians feverishly predicted a war of races. Absolute control of the labor supply was mandatory. "If the Government expects to establish voluntary labor as the future of these people," an Aiken man wrote Provisional Governor Benjamin F. Perry, "then indeed will much of the most productive and richest portions of the Southern States become a howling wilderness and a war of extermination with all of its horrors ensue." A system of compulsory or organized labor was the only answer to the problem, he continued, the sole means by which the blacks could ever

understand that freedom meant work. "Moderate corporeal punishment" would keep the workers in line."<sup>28</sup>

However much they despised the idea of black freedom, whites recognized, basically, their absolute dependence on black labor. Although some whites left the state and others made elaborate plans to attract white immigrant labor, most conceded quickly their need for the former bondsmen. "The white citizens must show much more energy and willingness to work in the fields than they have yet manifested," a Freedmen's Bureau Agent put it succinctly, "before they can be in any respect independent of negro labor."<sup>29</sup>

The freedmen were equally dependent upon the whites, but they seized the opportunity to test the meaning of liberty before they were willing to settle down and contract their labor. Freedom initially mean simply the right to pick up and go. Most blacks in South Carolina left their masters--the symbol of their bondage. There was a tremendous amount of movement among the ex-slaves in South Carolina as family members sought one another, and slaves who had fled to the Union Army from their masters, or from

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<sup>28</sup>T. Fraser Matthews to B.F. Perry, 21 August 1865, Benjamin F. Perry Papers, Alabama State Department of Archives and History, Montgomery, Alabama. See also Steven A. Channing, Crisis of Fear: Secession in South Carolina (New York: Simon and Schuster, 1979), pp. 25-26, 35-36, 58-59.

<sup>29</sup>Report of William Stone, 31 July 1868, Bureau of Refugees, Freedmen, and Abandoned Lands (hereafter cited as BRFAL), Record Group (hereafter cited as RG) 105, M869, roll 36, National Archives (hereafter cited as NA).

the Union Army with their masters, returned to their original vicinity. When all the moving around was said and done, according to Joel Williamson, a sense of place was as important to the blacks of South Carolina as to the whites. Most of the freedmen settled near their home place. Some even returned to work for their former masters.<sup>30</sup>

Black expectations in freedom were greater than the position granted them by the ruling class. Initially the freedmen were pleased to have the opportunity to legitimize their marriages, adopt or perhaps reveal surnames, worship in their own churches, and make contracts. Inevitably, however, these freedoms were not enough. The freed black people of South Carolina had a strong sense of the labor theory of value. They had sweated long and hard on Masters' land, and now they were convinced that the land should belong to them. Blacks hesitated to contract their labor for years following emancipation lest obligation to a contract prevent their ability to accept the anticipated government grant of forty acres and a mule. Education was another important goal of Carolina freedmen. They eagerly sent their children to school, and even the adults labored hard to learn to read and write.<sup>31</sup>

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<sup>30</sup>Williamson, After Slavery, pp. 34-41.

<sup>31</sup>Ibid., pp. 88-91; Edward Magdol, A Right to the Land: Essays on the Freedmen's Community (Westport, Conn.: Greenwood, 1976), pp.139-45.

As much as anything else, the freedmen of South Carolina desired access to the political process. During the heady, early days of freedom, black delegates gathered in Zion Church in Charleston to discuss their goals and make them known to the white people of their state. "Lifted up by the providence of God," they declared,

We ask for no special privileges or peculiar favors, we ask only for even-handed Justice, or for the removal of such positive obstructions and disabilities as past, and the recent legislators have seen fit to throw in our way and heap upon us. . . . We simply desire that we shall be recognized as men; that we have no obstructions placed in our way; that the same laws which govern white men shall direct colored men; that we have the right of trial by a jury of our peers, . . . that we be dealt with as others in equity and justice.<sup>32</sup>

Blacks in South Carolina demanded to be treated as men--not hired men, or colored men, or even freedmen--but men. Nothing less would satisfy their craving for justice and equality.

It was precisely in their capacity as men that blacks were most threatening. White South Carolinians were absolutely incapable of thinking in terms of granting blacks equality of rights as citizens. Blacks were innately inferior in the white South Carolina mind and must at all costs be prevented from rising to a higher level. Sharing rights with freedmen was unthinkable. While blacks wanted

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<sup>32</sup>Proceedings of the Colored People's Convention of the State of South Carolina (Charleston: South Carolina Leader, 1865), p. 25.

equality, whites inevitably jumped to the conclusion that granting the rights of manhood and citizenship to the freedmen would mean either black supremacy or a bloody war of extermination between the races. There was no middle ground. A.C. Garlington of Newberry, for example, predicted a bloody race war if the Radicals insisted on absolute equality. J.M. Anderson complained that the political equality of the negro was "the ne plus ultra of all evils . . . alone and of itself utterly intolerable and certainly ruinous. It will certainly bring every other evil in its train," he predicted: "Give the negro political equality and he will legislate social equality." Another South Carolinian carried the hysteria surrounding the idea of social equality to its illogical extreme, fearing the United States Congress would someday require "that your daughter and mine shall either marry negroes or die unmarried." White men were convinced that they needed to protect their women from "insult and abuse" by black men. A constant vigilance was necessary to continue the customary order of society.<sup>33</sup>

Freedmen's Bureau Representatives in South Carolina were in a unique position to observe the stormy racial

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<sup>33</sup>A.C. Garlington to A. Baxter Springs, 17 February 1866, Springs Family Papers; G.I.C. to W.P. Miles, 18 April 1867, William Porcher Miles Papers, both in Southern Historical Collection, University of North Carolina, Chapel Hill; J.M. Anderson to Gov. Perry, n.d.; T.J. Moore to Gov. Perry, 27 September 1865, both in Benjamin F. Perry Papers, Alabama State Department of Archives and History.

relations between the freedmen and their former masters during this transition period. The Yankee officers reported even handedly the struggle between the races whether it was thievery by the blacks or attempts by the landowners to cheat the laborers out of their just portion of the crop. Like the local whites, the Bureau officers became impatient with the freedmen. Unlike white South Carolinians, however, the Yankees accepted the blacks as people capable of maturing into their responsibilities as citizens. Bureau representatives recognized the absolute intransigence of the whites, however, and noted that in some ways the freedmen were better off as slaves "for then it was certainly to the interest of their owners to at least preserve their property from abuse, but now being no one's possession, any one may injure them at pleasure." The former rebels were unrepentant and unreconstructed, according to Freedmen's Bureau Representatives; given any hope of success they would gladly take up arms again. "Miniature Hamilcars, bringing out their Hannibals," the South Carolinians still believed "that secession was right, that the negro is fit for nothing but a slave, and that Northern men will find it out so." The more thoughtful Yankee officers recognized that the whites needed for Reconstruction to fail so that they could continue to believe that slavery was just:

It is not to be expected that the former slave owners will now go to work and teach their former slaves how to get along as free men, because they fear that if the freed people have sufficient opportunity given them,

they may show to the world that they are worthy of their freedom; no they will do the opposite; they will try and prevent such improvements in order to show to the world that liberty is a curse to these people and that they need masters.<sup>34</sup>

The Freedmen's Bureau Representatives assessed the white attitude accurately. The white population of South Carolina was absolutely opposed to the social and political elevation of the former slaves. Southern obstinacy in relation to the freedmen dictated a more radical Reconstruction policy on the part of the national government. The Reconstruction Act of 1867 called for new state constitutions providing for manhood suffrage, their approval by a majority of registered voters, and ratification of the Fourteenth Amendment as condition for readmission to the Union. Recognizing the inevitability of black suffrage, a few white leaders in South Carolina under the leadership of Confederate hero Wade Hampton called for cooperation and expected to control the votes of the former slaves. But most of the state's whites considered it demeaning to take part in a political process where their former slaves could participate on an equal basis. A convention of whites served notice that the property and intelligence of South Carolina "would never acquiesce in Negro equality or supremacy." Preferring military rule to a

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<sup>34</sup>H.H. Alvord to Gen. Ely, 8 September 1865, BRFAL, RG 105, M869, Roll 34; George Pingree, Annual Report, 24 September 1867, BRFAL, RG 105, M869, Roll 35; F.W. Liedtke to Major E.L. Deane, 27 December, 1867, BRFAL, RG 105, M869, Roll 18, NA.

constitution which called for universal suffrage, the whites boycotted the polls, hoping to prevent the necessary majority from voting in favor of a constitutional convention. The plan failed, however, and the Republican Party sent its own delegates to the convention. The new constitution of South Carolina was drafted entirely without the aid of the former leaders of the state.<sup>35</sup> Thus did the whites, by their own actions, deprive themselves of a voice in creating the state government which they insisted throughout the Reconstruction period was illegitimate.

Eligible whites went back to the polls in June, 1868, but their efforts to defeat the Constitution and Republican Party slate were wholly unsuccessful. The Democrats managed to elect only six of thirty-one senators and fourteen of 124 representatives. They carried ten counties. The freedmen with the help of carpetbaggers and local white Republicans elected a carpetbag governor and a state legislature with a black majority in the lower house.<sup>36</sup> The unthinkable had actually happened in South Carolina: "A black colony succeeding the reign of chivalry and truth. A Negro legislature framing laws for men born under the Palmetto." Most of the former ruling class would have agreed with

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<sup>35</sup>Francis Simkins and R.H. Woody, South Carolina During Reconstruction, pp. 86-7.

<sup>36</sup>Reynolds, Reconstruction in South Carolina, pp. 106-9; Simkins and Woody, South Carolina During Reconstruction, pp. 109-11.

Alfred Huger who declared that he would "rather die in chains than be participant criminal in this unholy work."<sup>37</sup>

At the head of this "unholy work" was Governor Robert K. Scott, a carpetbagger from Ohio by way of the United States Army and the Freedmen's Bureau. As the head of the Freedmen's Bureau in South Carolina Scott earned the reputation of being fair to blacks and whites alike. Scott had made money in land speculation before the Civil War and should not be accused of entering politics simply to line his own pockets. In fact he had given his own funds generously to private relief in the state while working for the Bureau. Scott was drafted by the Republicans as their choice for Governor. He hesitated initially and then decided to run out of a sense of duty. As Governor, Scott was in a precarious position. The whites despised him for his close social relations with black Republicans, yet he depended upon the black vote for his office. When he brought friends from outside South Carolina to fill state offices, both sides complained. Historians have traditionally held Scott responsible for the State's Reconstruction financial disasters--bond fraud and Rail Road problems. Richard N. Current has recently reevaluated Scott, however, and argued that the state was already in serious financial trouble before he took office. Current

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<sup>37</sup> Alfred Huger to B.F. Perry, 11 July 1867, Benjamin F. Perry Papers, Alabama State Department of Archives and History.

blamed the state Democrats as much as the Republicans for the bond problems, suggesting that the whites deliberately sabotaged the state's credit. For Current, "Scott was at least as much a hero as anyone else among the many villains, Republican and Democratic, in South Carolina politics."<sup>38</sup>

Daniel Henry Chamberlain, a Massachusetts Yankee of the abolitionist persuasion, was another prominent carpetbagger in the South Carolina Government. Serious and scholarly, Chamberlain had attended both Harvard and Yale, and was probably the best educated of all the state's carpetbaggers. Chamberlain quit law school in 1864, lest the War end before he had his chance to serve. He spent the rest of the Civil War years as an officer of black troops at a desk job. Chamberlain journeyed to South Carolina after the War to settle the affairs of a friend who had died. There he tried his hand at cotton planting in the lowcountry, hoping thereby to make his fortune. He soon discovered that politics was better suited to his talents. Chamberlain played a prominent role at the constitutional convention where his eloquent speeches often won the day. When elected State Attorney General in 1868 Chamberlain had yet to argue his first case in court.<sup>39</sup>

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<sup>38</sup>Richard N. Current, Those Terrible Carpetbaggers, (New York; Oxford, 1988), pp. 40-45, 214-35. See also Simkins and Woody, South Carolina During Reconstruction, pp. 369-70, 154-57; Williamson, After Slavery, pp. 382-85.

<sup>39</sup>Current, Those Terrible Carpetbaggers, pp. 91-98.

The Republican Legislature of South Carolina was not the "convention of baboons and pickpockets" which one critic labeled it, but it was fraught with problems from its inception. Black legislators, unskilled in the ways of government, committed excesses for which the period is perhaps most remembered. The Reconstruction government of South Carolina was notorious for its gold spittoons, the Capital's barroom, and the buying and selling of votes. Despite the myths, however, most of the legislators took their work seriously, and most did not venture to the state house directly from the cotton fields. Antebellum free blacks, freedmen who had served in the Union Army, and Northern blacks made up a large proportion of the state legislature. Most had at least a common school education, although some were actually illiterate. Local white Republicans and carpetbaggers joined the blacks in the state government. Most of the scalawags, according to Joel Williamson, had previously displayed a stronger attachment to the Union than the average South Carolinian. The Northern blacks who served in the state government were zealots, strongly committed to the elevation of the freedmen. The carpetbaggers were not the "bootless opportunist" of Southern myth, but were usually young army officers who had remained in the state at the War's end. Many of them were well-educated and capable; some were

idealists.<sup>40</sup> The refusal of the South Carolina white leadership to participate in politics alongside the freedmen doubtless promoted carpetbaggers to positions of authority they would not have enjoyed otherwise.

To provide needed services for their constituency, the Republican Government of South Carolina raised taxes to unprecedented heights. High taxes were absolutely necessary if the state was to fund public education, hospitals, insane asylums, internal improvements, and other needed facilities. But high property taxes, the primary source of state revenue in Reconstruction South Carolina, was a vast change from pre-war policy when a head tax on slaves had provided most of the state's income. Real estate had been consistently undervalued for tax purposes, particularly in the upcountry where the tax bill for the small farmer was negligible. After the War--with land values falling and money scarce--property was assessed at a much higher rate. Revenue was not the only purpose behind the Republican tax program. The Radicals legislated high taxes in a deliberate effort to redistribute land to the freedmen. The Republicans expected the high taxes on unused land to force property on the market where the state could purchase it for resale or private individuals could buy. "The owner cannot afford to

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<sup>40</sup>Quote from S. Sumter to John, 29 March 1868, Waties-Parker Family Papers, South Caroliniana Library, University of South Carolina, Columbia, S.C.; Williamson, After Slavery, pp. 371-80.

keep thousands of acres idle and unproductive," as Governor Scott put it in a speech, "Stern necessity . . . will compel him to cut up his ancestral possessions into small farms, and sell them to those who can and will make them productive; and thus the masses of the people will become property holders."<sup>41</sup>

The Republican tax program worked as planned, releasing vast quantities of land forfeited to the state. But it increased the antagonism of the majority of the white citizens of the state--the property owners--toward the government. Times were hard in Reconstruction South Carolina, and property owners resented the extra burden of taxation. An unexpected result of the tax program was that it fell particularly hard on small farmers, both black and white. Freedmen who had been able to acquire land often lost it to the very government that was supposed to protect their interests. Resentment of the high taxes which they had never had to pay before bound the white yeomen to the planters and undermined the authority of the Republican government as surely as did the racism which bound the

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<sup>41</sup>Williamson, After Slavery, pp. 148-51; Lacy K. Ford, Origins of Southern Radicalism: The South Carolina Upcountry, 1800-1860 (New York: Oxford, 1988), pp. 308-10; J. Mills Thornton, III., "Fiscal Policy and the Failure of Radical Reconstruction in the Lower South," in Region, Race, and Reconstruction: Essays in Honor of C. Vann Woodward, ed. J. Morgan Kousser and James M. Mc Pherson (New York: Oxford, 1982, pp. 349-94. Governor Scott quoted in "The South Carolina Problem: The Epoch of Transition," Scribner's Monthly (June 1874), pp. 138-39.

whites together. Since tax payers were, by and large, white folks, and Republicans were generally black, taxpayers complained loudly of taxation without representation.<sup>42</sup>

Conservative white South Carolinians never recognized the legitimacy of their predominantly black state government. Their understanding of constitutional liberty assured them that a lawful government was one which rested squarely on the shoulders of the educated and propertied classes who then established government policy for the benefit of the entire community. Republican efforts to establish a genuine democracy, redistribute land, and provide facilities for the black citizens, in the minds of conservative white South Carolinians, was nothing more than class legislation which they considered grossly unfair. Having remained aloof from the creation of their state government because of the absolute denial of the rights of freedmen to participate in the political process, conservative whites now considered a government which failed to include them and consider their interests absolutely unauthorized. Accustomed to a laissez faire system which

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<sup>42</sup> Williamson, After Slavery, pp. 148-51; Ford, Origins of Southern Radicalism, pp. 308-10; for the story of South Carolina's efforts to make land available to the freedmen see Carol K. Rothrock Bleser, The Promised Land: The History of the South Carolina Land Commission (Columbia: University of South Carolina Press, 1969). On the yeomen farmers and the tax issue, see for example, Edward and Elizabeth Lipscomb to Smith and Sally Lipscomb, 30 June 1869 and 11 April 1871, Edward Lipscomb Papers, Southern Historical Collection, University of North Carolina, Chapel Hill.

fostered their own class interests, whites objected to positive legislation which favored a different class. Thus racism combined with a traditional understanding of constitutional legitimacy to foredoom the democratic governments Republicans sought to establish.<sup>43</sup>

The Republican program in South Carolina was absolutely unacceptable to most white South Carolinians. It was a humiliating program totally foreign to their social reality, a government imposed by self-righteous conquerors and carried forward by outsiders, traitors, and inferiors, or "carpetbaggers, scalawags, and niggers" as they preferred to call them. It had little or no indigenous support among the recognized leaders of the state. When the "property and intelligence" of the state aroused themselves from their political lethargy to take charge again, the Republican Party in South Carolina lacked the strength and tradition to maintain itself. Political frustration, racial antagonism, economic hardship, and a deep conviction that the Republican Government of their state was completely illegitimate convinced the whites that things had to change.

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<sup>43</sup> Michael Les Benedict, "The Problem of Constitutionalism and Constitutional Liberty in the Reconstruction South," in An Uncertain Tradition: Constitutionalism and the History of the South, ed. Kermit L. Hall and James W. Ely, Jr. (Athens: University of Georgia Press, 1980), pp. 225-42. See also Kenneth S. Greenberg, Masters and Statesmen: The Political Culture of American Slavery (Baltimore: Johns Hopkins, 1985), pp. 4-5.

White South Carolinians determined to reclaim the state in 1870, a year which was to be known as the "Year of the Happy Deliverance." The election involved the governorship and control of the entire state government. The Democratic Press urged a conciliatory policy toward the blacks and a united white vote. Such a strategy was necessary in a state where the black electorate constituted about sixty percent of the eligible voters. Because the freedmen had rejected the Democratic Party absolutely in 1868, Democrats formed the Union Reform Party with the aid of disaffected white Republicans. The Reform Candidate for Governor was Judge Richard B. Carpenter, a Republican; for lieutenant-governor the Party chose Matthew C. Butler. A number of blacks ran for office at the local level only.<sup>44</sup>

The Reform party actively courted the black vote. Candidates stumped the state, playing to racially mixed audiences. The campaign focused on high taxes and corruption in the state government. The whites posed as friends of the freedmen and insisted that Republicans used the blacks for their own self interest. They urged the blacks to desert the Union Leagues and vote their own consciences. Reformers recognized the legal rights of the freedmen, including the franchise, but their general attitude made clear that they were able to do so only by

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<sup>44</sup>R.H. Woody, "The South Carolina Election of 1870," North Carolina Historical Review 8(April 1931): 168-86; Trelease, White Terror, p. 350-51.

holding their noses. Basically the Reform Party was composed of white supremacy Democrats who had accepted the black vote only at bayonet point.<sup>45</sup> Where the Reform candidates focused on corruption in the Republican ranks, Republican candidates reminded the blacks that they were the Party which had consistently befriended them. They intimated, moreover, that the Reformers would attempt to reenslave the freedmen. A vote for the Republican Party thus signified a desire to remain free. Republicans denied the corruption charges, and focused on the benefits the Radical government had accomplished including a homestead act and public education.<sup>46</sup>

Fearing that persuasion alone would not win the election, both sides resorted to threats and intimidation to strengthen their chances at the poll. Economic coercion was a favorite campaign method among the whites who threatened to discharge any workers who failed to vote the Reform ticket. Governor Scott and the Republicans used the black militia and Union Leagues to maintain black solidarity. The freedmen themselves were actively hostile to blacks who planned to desert the Republican ranks. As the election drew closer, violence became an important election tool in

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<sup>45</sup> Williamson, After Slavery, pp. 352-5; Woody, "Election of 1870", pp. 174-6; Alruthus Ambush Taylor, The Negro in South Carolina During the Reconstruction (New York: AMS, 1971), pp. 193-7.

<sup>46</sup> Ibid.; Woody, "Election of 1870," pp. 172-6.

several upcountry counties where the ratio between blacks and whites was very close. Republicans appealed to Governor Scott for arms and ammunition before the election reporting that whites were killing blacks in Laurens County and a large fight was expected in Newberry. Whites in Spartanburg County mounted a campaign of violence before the election, whipping Republicans, turning them off their lands, and in some instances even shooting those who refused to deny their Radical principles. Republicans testified after the election that many Spartanburg blacks refrained from voting from fear of losing their livelihood and even their lives.<sup>47</sup>

Neither side was willing to risk a free and fair election. Armed whites surrounded the polls in some precincts of Spartanburg County and turned black voters away insisting that "this is a white man's government." Whites from the Augusta, Georgia, area flocked into Edgefield County to swell the Reform Party's numbers. Not to be outdone, the blacks imported votes from North Carolina. Since voters did not have to be registered, the

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<sup>47</sup>A.H. Valentine to R.K. Scott, 20 September 1870, Governor Scott Papers, Letters Received, South Carolina Department of Archives and History, Columbia, S.C. Affidavits of 1870 Election, Spartanburg County, Green Files, South Carolina Department of Archives and History, especially the testimony of Clem Bowden, William Madison, and Tom Fisher. Joel Williamson has denied that the Ku Klux Klan was inherently political, because Klan violence did not begin until after the Election of 1870. Evidence in the Governor's Papers, affidavits in the Green Files, and the Ku Klux Klan Reports all indicate that Klan violence started before the Election.

possibilities were endless. Some blacks reportedly voted more than once; some underage blacks voted; and rumor had it that some sick freedmen even sent their wives to cast their votes for them. The worst excesses probably occurred after the precincts closed. Election laws allowed the ballots to be held by the election officials--all Republicans--for several days before they were turned in, a practice which literally invited fraud. One election manager in Laurens County, the notorious Joe Crews who was himself a candidate for the legislature, returned a large vote for himself which reversed the 1868 Democratic majority in his precinct and then destroyed the ballots. Despite the fraud and intimidation, however, both sides recognized that the Republicans had scored a tremendous victory at the polls; indeed the totals for the Republicans and Democrats very nearly matched the corresponding registered voters for blacks and whites.<sup>48</sup>

The Reform Party failed, basically, because Conservatives were willing to offer the black electorate nothing more than "ballyhoo and barbecue." Whites found it

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<sup>48</sup> Affidavits of Election, 1870, Green Files, South Carolina Department of Archives and History, testimony of Tench Blackwell; A.B. Springs to John Springs, 22 October 1870, Springs Family Papers, Southern Historical Collection, University of North Carolina, Chapel Hill; Woody, "Election of 1870," pp. 183-4; United States Congress, Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States (Washington: Government Printing Office, 1872), 3: 123-4, 82 (hereafter cited as KKK Report); Trelease, White Terror, p. 351.

humiliating to recognize the freedman as a political equal and scarcely disguised the campaign effort to restore white supremacy. Blacks were not stupid. They recognized, as a prominent black politician explained to a newspaper correspondent, that those who considered slavery a God-ordained institution had not changed so quickly.<sup>49</sup> The freedmen understood the situation precisely. Having failed in their attempt to restore their power through the electoral process, white supremacists after the Election of 1870 resorted to terror as the means by which they would control the black population.

The Ku Klux Klan was the white solution to a black population which refused to stay in its place and maintain a slavelike demeanor. The Klan initiated in November, 1870, a reign of terror throughout upcountry South Carolina which continued unabated until September, 1871. Hooded nightriders swept through the countryside, their horses draped, relentlessly persecuting the Republican population. Again and again they whipped black and white Republicans for no offence greater than voting the Radical ticket. Republicans who escaped with only a whipping were fortunate, however. The South Carolina Klan in its fury committed some

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<sup>49</sup>Williamson, After Slavery, p. 352-6.

of the most heinous crimes in the history of the United States.<sup>50</sup>

The Klan was not new to South Carolina in 1870, but had existed in the state since 1868 when a Klansman from Pulaski, Tennessee, had organized a Klan in York County. Ku Klux Klan violence and intimidation played an important part in the presidential election of 1868 in South Carolina, when the Klan focused on breaking up the Union Leagues and preventing blacks from voting. Nightriders killed several Republican leaders, whipped others, and threatened many more with eviction if they dared to vote. The brutal campaign was successful in keeping blacks from the polls in the upcountry. In several counties which had reported a Republican majority in the April state election, Seymour led Grant by a substantial majority. Clearly the Klan could make a difference in counties where the racial mix was close. Blacks needed protection in order to vote.<sup>51</sup>

A period of relative calm in Klan activities followed the election of 1868, but violence remained for the white population a viable solution for racial antagonism. Although Democrats insisted that "profound peace" existed in the state, Republicans continued to write their governor

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<sup>50</sup> KKK Reports, Vol. 3, 4, & 5, *passim*; see also Trelease, White Terror, *passim*; and Simkins, "Ku Klux Klan in South Carolina," *passim*.

<sup>51</sup> Herbert Shapiro, "The Ku Klux Klan During Reconstruction: The South Carolina Episode," Journal of Negro History 49 (January 1964): 35-39.

requesting protection. A correspondent from Newberry County reported that some "malicious devils" had set fire to the black school he had built on his property. Another wrote from Spartanburg that there was not a "sufficient number of loyal and law abiding citizens in this county to execute and enforce the laws." Disguised nightriders had destroyed his barn, his carriage house and carriage, and all his household effects. Although his son and daughter had identified some of the assailants, the local officials refused to punish them. The leading Democrats, he said, "rejoice at my misfortunes." A magistrate reported from York County that an organization of disguised men was burning the houses of good citizens--Republicans--and threatening their lives. From Edgefield a man who made it his practice to hire Republicans wrote that he was being run off his property because the local whites "would not suffer a raticule [sic] in the neighborhood." A Deputy Constable from Abbeville admitted the need for more law enforcement officers in the county and suggested to the governor that arming a strong force of black militia was the most efficient means of enforcing the laws and protecting the black population.<sup>51</sup>

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<sup>51</sup>J.P. Kinard to R.K. Scott, 19 April 1870; A.P. Turner to R.K. Scott, 23 December 1869, H.K. Robert to R.K. Scott, 14 January 1870; James N. Brisco to R.K. Scott, 8 June 1869; Jemy Hollinshead to R.K. Scott, 22 July 1869; all in Governor R.K. Scott Papers, Letters Received, South Carolina Department of Archives and History.

Governor Scott found himself in an untenable position. As governor of the state he was duty bound to protect the people; as a Republican he was absolutely dependent on the black vote. Yet he recognized that the majority of the white citizens of his state did not even recognize the validity of his administration. To mount an armed force of former slaves against the "property and intelligence" of South Carolina was certain to cause serious problems. His mail warned him that the "formation of Negro regiments . . . would most unquestionably lead to a war of races." Hoping to put a halt to the violence and assure a Republican victory at the polls in 1870, Scott began to organize and equip a black militia. The black militia, according to Herbert Shapiro, was largely responsible in 1870 for the Republican victory in the South Carolina upcountry.<sup>52</sup> The policy of intimidation which had carried the upcountry for the Democrats in 1868 failed in the presence of armed black troops. The Reform Party had humiliated white citizens by "pandering" to the black vote and then failed to produce a white majority in the upcountry.

Never again, upcountry whites vowed, would they be so humiliated. South Carolina Democrats understood precisely how to solve the Negro problem, and racial cooperation in

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<sup>52</sup>George W. Williams to R.K. Scott, 14 April 1869, Governor R.K. Scott Papers, South Carolina Department of Archives and History. Shapiro, "Klan During Reconstruction," p. 39.

the political arena was not the answer. The Ku Klux Klan mounted a campaign of terror following the Election of 1870 designed to halt the growth of the Republican Party, put the freedmen in their proper place, and restore the familiar social customs of the South.

CHAPTER 2  
KLAN CRIME AND THE SOUTH CAROLINA WHITES

Ku Klux Klan violence during Reconstruction assumed its worst form in the state of South Carolina. There the masked riders rode almost nightly over a period of several months immediately following the Election of 1870 terrorizing black families until they were forced to sleep in the woods and swamps in the dead of winter for fear of their lives. While the lowcountry with its large black majority remained relatively free of violence, Klan brutality reached its most fearsome proportions in nine counties of the upcountry: Chester, Fairfield, Laurens, Newberry, and Union in the lower Piedmont, Lancaster, Spartanburg and York in the upper Piedmont, and Chesterfield in the sand hills.

Although Ku Klux Klan outrages were common in both the upper and lower Piedmont, the areas varied widely in both population and economy. Whites in every county of the lower Piedmont were outnumbered by a black majority. The upper Piedmont, taken as a whole, had a majority of white people, but the percentage of blacks to whites was very close in Lancaster and York Counties (49 and 51.9 percent, respectively), a condition which perhaps made white Democrats there particularly susceptible to intimidating

black voters. Spartanburg County, with only 32.6 percent blacks, and a safe Democratic majority throughout the Reconstruction period was one of the most violent Klan Counties. Spartanburg whites were apparently opposed to blacks participating in politics regardless of whether they succeeded or failed.<sup>1</sup>

The racial differences between the upper and lower Piedmont reflected the differences in the economies of the two areas. The entire upcountry was characterized by smaller plantations and less wealth than the lowcountry, but the lower Piedmont was nonetheless dominated by cotton production and a plantation economy. Plantations were rarer and planters less likely to dominate the economy in the upper Piedmont, where white yeomen prevailed. Yeoman farmers in the upper Piedmont had practiced "safety-first" agriculture before the Civil War, concentrating on their own subsistence crops first and then producing a small amount of cotton for the market. When railroads penetrated the entire upcountry in the 1850's, the upper Piedmont became more market oriented with "safety-first" being sacrificed for increased cotton production. Towns grew, and local merchants prospered, a transition which continued throughout Reconstruction. The upper Piedmont continued to produce a large amount of subsistence crops despite the increased

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<sup>1</sup> Julian J. Petty, The Growth and Distribution of Population in South Carolina (Columbia: State Planning Board, 1943), Appendix F. Figures are for 1870.

importance of cotton, but the small farmers suffered from the falling cotton prices and high taxes. Many independent yeomen thus lost their land and became renters or sharecroppers.<sup>2</sup>

Emancipation complicated the shift which was already taking place in the upcountry economy. Freedmen made clear that they were no longer willing to work the gang system in the cotton fields. The change from gang labor to share wages or tenant farming was more difficult in the lower Piedmont than the upper, simply because planters there were more accustomed to working large numbers of slaves. Farmers were desperate for labor, however, and were thus forced by black recalcitrance and continued financial losses to accept the new arrangements. Freedmen all over South Carolina preferred rental agreements to sharecropping. Under South Carolina's lien law, renters qualified as owners of the crop and were thus able to give liens for supplies independent of the landowner, a system which increased the freedmen's

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<sup>2</sup>Lacy Ford, "Labor and Ideology in the South Carolina Up-Country: The Transition to Free-Labor Agriculture," in The Southern Enigma, pp. 25-41; Lacy K. Ford, "Yeoman Farmers in the South Carolina Upcountry: Changing Production Patterns in the Late Antebellum Era," Agricultural History 60 (Fall 1986):17-37; Lacy K. Ford, "Rednecks and Merchants: Economic Development and Social Tensions in the South Carolina Upcountry, 1865-1900," Journal of American History 71(September 1984): 298-303; Lacy K. Ford, Origins of Southern Radicalism, pp. 71-5, 245-55. On "safety- first" agriculture see Gavin Wright, The Political Economy of the Cotton South: Households, Markets, and Wealth in the Nineteenth Century (New York: Norton, 1978), pp. 55-74.

autonomy. Sharecroppers worked under closer supervision of the owner by whom they were paid and supplied. The growing independence of the workers alarmed the landowners who complained that the freedmen preferred politics to farming. They run off to political meetings, A.B. Springs, a wealthy York County planter wrote, "leaving fodder and cotton to take care of itself." Freedmen's Bureau Reports noted the same preference for politics. The freedmen leave for days without "any reason or right," one representative reported, "causing the planters much inconvenience and loss, and not improving their own chances for a respectable crop."<sup>3</sup>

Upcountry blacks were in fact much in earnest about politics. Having worked on smaller plantations and farms where they had more contact with whites than lowcountry slaves, the freedmen of upcountry South Carolina were correspondingly more politically astute. Thus they quickly grasped the meaning of the franchise. They flocked to Union League meetings where Republican Party organizers educated them in their rights as free men and their duties to the Republican Party. The Union Leagues were initially secret, oath bound clubs--not from any desire to do harm to the

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<sup>3</sup>Lacy Ford, "Transition to Free-Labor Agriculture," pp. 25-41; Richard Sutch and Roger Ransom, "Sharecropping: Market Response or Mechanism of Race Control?" in What was Freedom's Price? ed. David G. Sansing (Jackson: University Press of Mississippi, 1978), p.61; A.B. Springs to E.B. Springs, 19 September, 1870, Springs Family Papers, Southern Historical Collection, University of North Carolina; Report of Major Pingree, 31 December 1867, BRFAL, RG 105, M869, roll 35, NA.

white citizens--but in deference to the real fear held by the former slaves that political organization was dangerous. The secrecy reassured anxious blacks and eased their introduction to politics. The political education provided by the Leagues emboldened the freedmen and promoted local leadership among the blacks. Because of the Leagues, blacks were staunchly Republican, tightly organized, and zealous in their devotion to the party which had delivered them from bondage. They were vocal, moreover, in their opposition to the political and economic goals of the Democrats. Members of the Union Leagues took seriously their responsibility to discourage--physically if necessary--any blacks who threatened to desert the party ranks and go over to the opposition. Southern whites, predictably, perceived the Union Leagues as dark and sinister organizations which needed to be eradicated. The freedman's preference for political meetings over field work compounded the problem, and mutual distrust grew.<sup>4</sup>

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<sup>4</sup>John William De Forest, A Union Officer in the Reconstruction, ed. with Introduction by James H. Croushore and David M. Potter (New Haven: Yale University Press, 1948), pp. 126-27; Richard H. Abbott, The Republican Party and the South, 1855-1877: The First Southern Strategy (Chapel Hill: University of North Carolina Press, 1986), p. 111; A.B. Springs to John Springs, 22 October 1870, Springs Family Papers, Southern Historical Collection, University of North Carolina, Chapel Hill. On the Union League movement in Alabama and Mississippi see Michael W. Fitzgerald, The Union League Movement in the Deep South: Politics and Agricultural Change During Reconstruction (Baton Rouge: Louisiana State University Press, 1989).

If none of the white citizens of South Carolina welcomed the freedmen as their political equals--and whites all over the state agreed that political domination by their inferiors must and would end--upcountry whites took special exception to the political organization of the former slaves. Perhaps the overwhelming black majority in the low country counseled a more patient attitude there. Pringle Smith, for example, wrote from Charleston that "bayonet rule can't last always and, that over, the superior race will assert itself." That hope, however, was "only for a far off future." In the meantime one simply had to make the best of a bad situation. Upcountry whites impatiently determined to make more immediate changes. Irritated that a group of Union League members had been rowdy at a Reform Party rally, W.R. Robertson of Winnsboro proposed a solution to the problem of "stupid leading darkies . . . determined to provoke a conflict with the white race." Meet the problem "promptly and terribly," he insisted, "Kill up a few hundred of them" and thus "put a stop to their incendiarism in short order." The Yorkville Enquirer, ordinarily a voice of restraint for a Democratic newspaper, considered the Loyal Leagues "a perpetual source of irritation" which would inevitably "give rise to counter organizations and thus endanger the public peace."<sup>5</sup> Public peace, on white terms,

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<sup>5</sup>J.J. Pringle Smith to W.P. Miles, 2 April 1872,  
William Porcher Miles Papers, Southern Historical  
Collection, University of North Carolina, Chapel Hill; W.R.

depended upon the absolute political subjection of the blacks; upcountry whites objected fundamentally to any kind of organized, effective political effort among the blacks. Black assertiveness and solidarity was inimical to white supremacy.

The political organization and assertiveness training provided by the Union Leagues precipitated a spiraling reaction of white counter organization. Gearing up to protect themselves from the perceived threat, whites stockpiled large numbers of Winchester rifles and prepared for a war of the races.<sup>6</sup> White reaction necessitated further political action among the Republicans. Neither individual Republican Party members nor the party itself could stand against armed, organized ex-Confederates. Recognizing the antipathy of the majority of the white citizens to the possibility of an armed black electorate, Governor Scott nonetheless determined to organize a state militia strong enough to protect both his constituency and his own chances for reelection in 1870.

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Robertson to A.B. Springs, 23 August 1870, Springs Family Papers, Southern Historical Collection, University of North Carolina, Chapel Hill; Yorkville Enquirer, 24 September 1868.

<sup>6</sup>J.A. Jackson to John B. Hubbard, 3 July 1870; John Burke to John B. Hubbard, 10 October 1870, both in Report of the Joint Investigating Committee on Public Frauds, General Assembly of South Carolina at the Regular Session, 1877-78, Reports and Resolutions of the State of South Carolina, 1877-78.

The South Carolina Militia Law of 1869 authorized the Governor to employ as many persons as he thought necessary and proper to suppress insurrection, rebellion, or resistance to the laws. It forbade under penalty of fine or imprisonment any unauthorized military organizations. Technically the militia was not intended to be a strictly black organization, but the racial attitude of the vast majority of South Carolina whites foredoomed any possibility of a racially mixed organization. Republican politicians and personal friends of the Governor traveled throughout the state organizing companies of black volunteers, many with black officers at the local level. A few white companies were organized, but they failed to gain the necessary acceptance and authorization of the Governor as Commander in Chief. Sadly, Governor Scott could trust only the black militia companies to uphold the laws, because whites considered the Republican Party program completely unauthorized. The black militia complained that Scott had even considered accepting white companies, and the Governor admitted the difficulty of finding whites loyal to the State Government. Questioned whether he would obey the Governor as Commander in Chief in the event of an armed collision resulting from an attempt to enforce the laws, the captain

of a white company responded, "In case of difficulty, I will go with my race."<sup>7</sup>

If the Governor's initial purpose in creating a state militia was to protect the people who were his constituents from white violence and intimidation, the militia quickly assumed an overtly political nature. Indeed, the protection of the black electorate and the success of the Republican Party were so dependent upon one another that it is impossible to separate them. Scott's constables and militia organizers constantly advised the Governor in 1870 of the political situation and his chances for reelection. "I will carry the election here with the militia," one wrote from Laurens, "I am giving out ammunition all the time. Tell Scott he is all right here now." The black militia was most effectively armed and equipped in the upcountry where the black/white ratios were close and the Ku Klux Klan had resorted to violence and intimidation to keep the freedmen from the polls in 1868. Armed black militiamen accompanied Republican politicians to Party rallies to protect them from Reform Party interference. The militia made clear, also,

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<sup>7</sup>Otis A. Singletary, Negro Militia and Reconstruction (Austin: University of Texas Press, 1957; reprint, New York: McGraw-Hill, 1963), pp. 20-24; Reynolds, Reconstruction in S.C., pp. 114-15; Williamson, After Slavery, pp. 260-61; Robert K. Scott, Annual Message to Senate and House, January, 1871, Green Files, Legislative System, South Carolina Department of Archives and History.

that the freedmen should not even consider deserting the Party ranks.<sup>8</sup>

Whites in the South Carolina upcountry viewed the presence of an armed black militia as an intolerable affront, an insult "too grievous to bear." Indignation swelled as they watched the freedmen drill and march in the streets of the towns. The Yorkville Enquirer recommended the immediate organization of white companies to "appease this outraged sense of right." Tradition long grounded in the institution of slavery reminded every white that guns were for white men only. Every armed black was a potential threat to the entire white community. Whole companies of armed, trained black soldiers signaled inevitable disaster in the white mind if they were not checked. The martial airs assumed by the blacks further offended the honor of every South Carolinian who took pride in the region's military tradition.<sup>9</sup>

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<sup>8</sup>Joseph Crews to Capt. Hubbard, 3 July 1870, in Report of the Joint Investigating Committee on Public Frauds, p. 1687.

<sup>9</sup>Yorkville Enquirer, 15 September 1870, 22 September 1870, 6 October 1870. For a quieter voice of restraint see [Julius J. Fleming], The Juhl Letters to the Charleston Courier: A View of the South, 1865-1871, ed. John Hammond Moore (Athens: University of Georgia Press, 1974), pp. 371-72. On black troops and the white mind, see also Lawrence J. Friedman, The White Savage: Racial Fantasies in the Postbellum South (Englewood Cliffs, N.J., 1970), pp. 11-17. On the South and the military tradition, see John Hope Franklin, The Militant South: 1800-1861 (Cambridge, Mass.: Belknap Press, 1956).

Black soldiers had been a serious matter of contention for white South Carolinians ever since the War. As historian Leon Litwack wrote, "Nothing seemed more contrived to humiliate white manhood, insult white womanhood, and demoralize the ex-slave than the 'vindictive and revengeful' act of Federal authorities in stationing black troops in their midst." South Carolinians wrote provisional Governor Benjamin F. Perry expressing their alarm over the "unmixed evil" of black occupation troops who incited the freedmen "almost to a state of revolt." The editor of the Charleston Mercury warned that if blacks were allowed to bear arms, they would become "swaggering buck niggers" who would attack white women. When the Federal Government planned to organize a black militia in 1865, even the United States military commanders in South Carolina agreed with the Governor that it would be "disastrous in the extreme, and would undoubtedly inaugurate a war of races."<sup>10</sup> Plans for the black militia were cancelled. Nothing had changed this basic white attitude by 1870. When the Republican State Government actually organized a black state militia, white South Carolinians grimly determined to disarm the freedmen.

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<sup>10</sup> Litwack, Been in the Storm so Long, p. 268; W.F. de Saussure to B.F. Perry, 31 July 1865; Edward Frost to B.F. Perry, 30 August 1865; W.T. Burnett to B.F. Perry, 4 October 1865, all in Benjamin F. Perry Papers, Alabama State Department of Archives and History; Charleston Mercury, 26 January 1865, quoted in Friedman, White Savage, p. 15.

Taking courage from their guns and their comrades in arms, the black troops, for their part, engaged in behavior calculated to provoke a white population accustomed to a slavelike demeanor from every black. The freedmen clearly enjoyed drilling and firing their guns, often in the night, to the alarm of the white population. The black troops gloried in their uniforms, parading through the streets of town in colors of red, yellow and white, complete with epaulettes, some even sporting ribbons and feathers. Every company had a drum, a possession denied to blacks in slavery; the drumrolls alarmed whites often disturbing their sleep. From all accounts, the militia insisted on marching "company front" in town, taking up the entire street, and rudely shoving white citizens out of their path. Insulting language was not unusual, as John A. Leland, wrote the Governor, "and in these insults neither age nor sex was spared and the most diabolical threats were constantly made and heard." The militia accompanied Republican candidates to political meetings and sometimes created a loud disturbance when Reform candidates tried to speak. In Chester, for example, a large crowd of blacks "singing John Brown and hooting" made it utterly impossible for the candidates to go on with a meeting.<sup>11</sup> Some drunken black

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<sup>11</sup>It is necessary to keep in mind that the sources on the black militia were generally written by whites who were locked into the notion that any behavior on the part of blacks which was disallowed during slavery was intolerably insolent. Leland, a Ph.D. and president of a girls' school

militia actually murdered one white man, a one-legged ex-Confederate bootlegger, who sold the blacks enough whiskey to get them drunk, but not enough to satisfy their craving for liquor. This unfortunate event doubtless increased the hysteria of the white population.<sup>12</sup> The record indicates, nonetheless, that acts of violence by the black militia were extremely rare.

While the rank and file of the militia including the company commanders were entirely black, many of the officers were white--most of them political cronies of the Governor. Having these officers on the state payroll assured the Governor a statewide network of friends. Native white South Carolinians particularly objected to the kind of men Scott chose. The most infamous of the lot was Lieutenant Colonel Joe Crews of Laurens County, a slave trader turned scalawag, notorious for making "incendiary" speeches to the blacks.

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in Laurens, was arrested and jailed as a suspected Klansman in 1871; see John A. Leland, A Voice from South Carolina (Charleston: Walker, Evans & Cogswell, 1879; reprint, Freeport, N.Y.: Books for Libraries Press, 1971). J.A. Leland to R.K. Scott, 4 November 1870, R.K. Scott Papers, South Carolina Department of Archives and History; Mrs. J. Ward Motte to Robert Motte, 2 August 1870, Lalla Pelot Papers, Perkins Library, Duke University, Durham, N.C.; Peggy Lamson, The Glorious Failure: Black Congressman Robert Brown Elliott and the Reconstruction in South Carolina (New York: Norton, 1973), pp. 90-91; Williamson, After Slavery, p. 261; KKK Reports, 5:1425.

<sup>12</sup>KKK Reports, 3: 79-80 (Testimony of David T. Corbin); Compare Reynolds, Reconstruction in South Carolina, p.184. Klansmen broke into the jail where the black suspects were held, took them out and brutally murdered them. See Trelease, White Terror, pp. 356-58.

According to reports of white spectators, Crews insisted that the blacks were the rightful owners of the land, and promised them that they should have it through the Republican Party's tax policies. Judge Carpenter, the Reform Party candidate for governor in 1870 testified to the Congressional Investigating Committee that Crews encouraged the freedmen that if they wanted property "they should go and take it, and if the white people made a fuss about it they should burn down their houses." Whether or not Crews actually made such inflammatory speeches, the sight of him parading on horseback while his militia companies drilled was more than enough to make the whites despise him.<sup>13</sup>

The State of South Carolina spent enormous sums of money to recruit, arm, and equip the militia which was so despised by the white population. Many of the higher level officers were Governor Scott's carpetbagger friends from Ohio. They traveled throughout the State at the expense of the taxpayers, organizing the blacks for the Election of 1870. The number of men actually enrolled in the militia was between 90,000 and 100,000, most of them unlettered freedmen determined to protect their new found rights. Company captains were generally blacks who were leaders in the community. The common soldiers, like the officers, were

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<sup>13</sup> KKK Reports, 3: 241, 248; Mrs. J. Ward Motte to Robert Motte, 2 August 1870, Lalla Pelot Papers, Perkins Library, Duke University; Taylor, Negro in South Carolina During Reconstruction, pp. 190-91; Thompson, Ousting the Carpetbagger from South Carolina, p. 50.

on the state payroll, a situation which was interpreted by the majority of the white population as "but another excuse and pretext intended and used to enrich and secure in power the great wire-pullers of the Republican party by taxes wrung from an oppressed and helpless people."<sup>14</sup>

The white population objected in equal measure to the method by which the black militia was armed and equipped. Governor Scott sent his Adjutant and Inspector General F.J. Moses to Washington to appeal to the federal government for weapons. Moses procured some 10,000 Springfield muskets and all accouterments at no charge to the State of South Carolina. Moses then made contracts with the Remington and Roberts Breech Loading Rifle Companies to change the guns to breech loaders at a cost of approximately \$9.00 each. Of this amount Moses was to receive a kickback (he called it a commission) of one dollar per gun. This amount was discounted by the state paymaster and Moses lined his pockets with an easy \$7,000. Whether or not the modifications were necessary is a matter of controversy.

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<sup>14</sup>Report of the Joint Investigating Committee on Public Frauds, pp. 1679, 1684, This Report is the best source of information on the black militia, however, one must remember that it was published by the Redeemer Government in order to bring as much reproach as possible on the Republicans. Still, it contains unimpeachable evidence in the form of letters and financial accounts from the records of the previous period. Used with care, the testimony of the various witnesses who participated demonstrate that a large percentage of the militia expenses were a huge fraud on the state. On this point see also Lamson, Glorious Failure, pp. 97-98. For the community standing of black militia leaders see Edward Magdol, A Right to the Land, pp.109-36.

Governor Scott insisted that the second hand army weapons were virtually useless until changed; Democratic testimony later maintained, however, that the guns were actually more useful before they were modified. The State purchased another 1,000 Winchesters, complete with bayonets and ammunition. The "commissions" on these items were even more generous, an estimated total of some \$1,675.00 split between Moses and another Republican state official.<sup>15</sup>

With a total of only 11,000 weapons--distributed primarily in the upcountry where violence had been most threatening before the Election of 1868--among the 90,000 or so militia members, it is evident that the vast majority of the blacks were never armed. Still, 11,000 armed ex-slaves seemed enormously threatening to a white population long established in the belief that one black with a squirrel gun represented a serious danger of insurrection. Assessing the level of fear among the whites is difficult. While many whites insisted that the black militia spread terror among the entire white population, saner voices recognized, as a white militia officer expressed it, that "a lot of ignorant colored men with clumsy muskets in their hands" could never "catch a squad of experienced soldiers on blooded horses." Judge Richard Carpenter, Reform Candidate for Governor in 1870, testified before the Congressional Investigating Committee that "the people felt they had no security at all;

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<sup>15</sup>Report on Public Frauds, pp. 1689-93, 1709-13.

that they might be attacked at any minute." Still, the Judge recognized that the militia was never intended "to have any war with the white people." In Carpenter's estimation, the militia was organized strictly to guarantee a Republican victory at the polls. The Yorkville Enquirer reported during the election that the purpose of the black militia was not to "terrify the white population so much as the colored. The main purpose is to prevent colored men from leaving the Republican ranks and voting with the Reform Party." In a letter to the Charleston Courier, Julius J. Fleming similarly remarked that the militia was understood to be a movement "intended to marshal the black and to convert peaceful laborers into armed auxiliaries for party purposes."<sup>16</sup>

If some white voices recognized that there was no real danger from the black militia, the Ku Klux Klan nonetheless deliberately played upon the traditional fears of the whites in their determination to mass the white population in opposition to the blacks. Charles W. Foster of York County testified in the Klan trials, for example, that he knew of no alarm within the white community at the time the Klan began outraging the neighborhood. He was personally not at all afraid of the militia. Still, he stated, there was so

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<sup>16</sup>B. G. Yocom to John B. Hubbard, 2 September 1870, in Report on Public Frauds, p. 1686; KKK Reports, 3: 239; Yorkville Enquirer, 6 October 1870; [Fleming], Juhl Letters, p. 356.

much talk about the "negroes being up in arms" that he was eventually persuaded that he should join the Klan for mutual protection from the freedmen: "I was not afraid at the present time; but if everybody was afraid, I might be injured, too." Through their appeals to white fears, the Klan gained support and convinced the white community generally that the danger was acute. James Long of York insisted during the trials that "folks were pretty much scared" in his neighborhood; "they did not know but what the niggers might come with their arms and kill them."<sup>17</sup>

In its efforts to consolidate white public opinion against the black militia, the Ku Klux Klan had successfully appealed to white paranoia concerning armed blacks which had been nurtured in South Carolina through centuries of slavery. The Stono Rebellion of 1739 had convinced white South Carolinians that the master race alone should have the privilege of bearing arms. Any armed black was a potential assassin. Slavery had united the white community in its eternal vigilance against the possibility of insurrection. Virtually every white man of military age--whether a slaveowner or not--was required to belong to the patrol, the instrument through which whites maintained racial control. The patrols served as "courts on horseback" with authority

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<sup>17</sup>Proceedings in the Ku Klux Trials at Columbia, S.C. in the United States Circuit Court, November Term, 1871 (Columbia: Republican Printing Company, 1872; reprint, New York: Negro Universities Press, 1969), pp.216-221; KKK Reports 3: 1763-64.

to "try, judge, sentence, and punish offenders on the spot." The patrols had control not only over the slaves but also over free blacks and any whites suspected of conspiring with blacks. The patrols rode the highways at night breaking up meetings of blacks, arresting those who were found away from their homes, and searching for guns. On the patrol rested the responsibility for stopping insurrection before it began.<sup>18</sup>

The Ku Klux Klan, to a large degree, was a continuation of the old patrol system. The presence of armed black troops conjured up the specter of insurrection which had haunted South Carolinians for so long. When rumor got out that black militia members had threatened to "kill from the cradle to the grave," reason gave way to the traditional racial fears. "Placing arms in the hands of the colored men," the Yorkville Enquirer later reported, "gave a feeling of insecurity to the whites, and caused a feverish feeling of alarm to pervade every community. Whether this feeling was well grounded, or otherwise, made no difference to the fact that such a feeling actually existed, and so long as that feeling existed there was imminent danger of a collision upon the slightest provocation." Arming the black

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<sup>18</sup>Forrest G. Wood, Black Scare: The Racist Response to Emancipation and Reconstruction (Berkeley: University of California Press, 1970), pp. 140-41; Joel Williamson, The Crucible of Race: Black-White Relations in the American South Since Emancipation (New York: Oxford University Press, 1984), pp.17-19; Williamson, After Slavery, pp.248-49.

citizens convinced whites that they, too, must arm themselves for self-protection.<sup>19</sup> Like the antebellum patrol, the Ku Klux Klan rode the highways at night as courts on horseback to prevent the blacks from rising. That the black militia posed little or no genuine danger was lost on the white community.

As important as the fear which bound whites together in support of the Klan was the inability to accept the black militia simply because it violated tradition and offended the honor of the whites. The military tradition was strong in South Carolina, but it was for whites only. The sight of armed, uniformed blacks drilling in the town squares infuriated white South Carolinians. An outraged sense of honor demanded that the black militia be disarmed.

Thus through its appeals to traditional Southern fears and to the honor of the white men, the Ku Klux Klan was successful in uniting the white population--with the exception of carpetbaggers and scalawags whom most native whites considered beneath contempt. Drawing its ranks from every class of white society, Klan membership in the upcountry included the greater part of the adult male population. The organization's leaders came from the planter and professional class, many of them former

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<sup>19</sup> Yorkville Enquirer, 23 March 1871. For evidence that blacks also considered the antebellum patrol system and the Klan "bout de same," see Gladys-Marie Fry, Nightriders in Black Folk History (Knoxville: University of Tennessee Press, 1975), pp. 154-56.

Confederate officers. Ordinary Klansmen tended to be poor whites who were often as ignorant and illiterate as the blacks they attacked. Whites who preferred to remain aloof from the Ku Klux Klan were pressed into service through threats and night attacks so that the Klan would represent a unified white community consensus. With white support of Ku Klux Klan outrages established, the nightriders were free to terrorize their victims at will. Until the federal government intervened, Klan outrages went unreported and unpunished.<sup>20</sup>

With white support assured, the Ku Klux Klan instituted in upcountry South Carolina following the election of 1870 a wave of terror unequaled in the nation's history. Sweeping through the countryside late at night, masked riders burst into the homes of Republicans, dragged hundreds of them from their beds and whipped them severely. The three volume Ku Klux Klan Report for South Carolina documented 213 whippings in Spartanburg County; Allen Trelease estimated approximately 600 total whippings for York County. Little wonder that great numbers of freedmen slept in the woods and swamps in fear of their lives. If whippings were the most frequent manifestation of Klan violence, they were hardly the most atrocious. Robbery, rape, arson, and even murder were common. The Klan Reports

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<sup>20</sup>Trelease, White Terror, pp. 349-380; KKK Reports, 5, *passim*.

documented a total of thirty-eight murders in four counties: York, Laurens, Spartanburg, and Union, between the election of 1870 and the suspension of habeas corpus in April 1871. Since President Grant suspended the writ of habeas corpus in the nine counties where Klan violence was most serious, this body count is undoubtedly low for the upcountry.<sup>21</sup>

Most of the South Carolina Klan's nocturnal activities demonstrated the fear of armed black men and determination to check the freedmen's political progress which has dominated historiographical assessments of the Klan from the Dunning School to Allen Trelease's account. Yet the political goals of the Klan were blended with the desire to preserve the traditional community values which Charles L. Flynn recognized in his work on the Georgia Klan. On the typical Klan visit, recounted time and time again in the 2,000 pages of testimony in the South Carolina Klan Reports, nightriders forced their way into the freedman's home, demanded to talk to the man of the house, questioned him about his political activities, ordered him to renounce the Radical Party, dragged him outside, then delivered a severe whipping. Almost every Klan visitation included a search for weapons. Some blacks were spared a whipping on the first visit if they agreed to publish a notice that they had repudiated the Republican Party. The blacks who told this

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<sup>21</sup>Trelease, White Terror, p. 365; KKK Report, 3: ii-xxxv; 4: 919-22.

story were almost always Republicans. Many were also involved in the Union Leagues or the black militia. Black leaders were a special target for Klan wrath. In these model Klan visits, contempt for the black man, fear of an armed black militia, and desire to suppress the Republican Party were so inextricably intertwined that it is impossible to separate them. Since it was the Republican Party which had extended political rights to the freedmen, the effort to "put down Radicalism" was less a movement against the Republican Party per se than an all out effort to reinstitute traditional white values. Put more simply, the Klan attacked Radicals as one man testified, because "you damned niggers are ruining the country."<sup>22</sup>

White Republicans, like blacks, suffered the resentment of the Ku Klux Klan. Both native Republicans and carpetbaggers renounced their party membership at the insistence of the Carolina nightriders. Many white Republicans received whippings. If these Klan visits to whites served a political purpose--to suppress the Radical Party--they nonetheless demonstrated a demand for white solidarity and an overarching desire to halt the black man's progress. John Neason, for example, owned a country store where he allowed blacks to hold political meetings. The Klan forced Neason to close his business within ten days and leave town. While they were on the premises, Klansmen

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<sup>22</sup>KKK Reports, 3, 4, and 5, *passim*.

burned the wooden building Neason has built for a black school. Klansmen raided John Plowden, a native Southern Republican, beat him and left him tied up in the swamp. To the local whites, Plowden was a "traitor" to his party and family.<sup>23</sup>

The Klan's attack on William Champion, another Southern Radical and election official, is perhaps their most graphic statement that white support for black rights would not be tolerated. Klansmen shot into Champion's home about a hundred times, blindfolded and abducted him, then took him to a clearing where they were holding several blacks. After whipping Champion until he was faint, Klan members shamed him further by forcing him to kiss the posterior and "private parts" of a black woman and posterior of her husband, demanding that he have sexual intercourse with the woman, then asking him how he "liked that for nigger equality." After removing the blindfold, the nightriders forced Champion to whip the black man.<sup>24</sup> All three of these attacks blend political purpose with racial hatred in support of a traditional Southern norm--white supremacy.

As dispensers of justice and repositories of Southern values, Ku Klux Klansmen rode in support of other societal norms which had nothing to do with politics. Often this form of violence was directed against blacks. Pressly

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<sup>23</sup>Ibid., 3: 41-42, 274-75.

<sup>24</sup>Ibid., 3: 365-67.

Thompson received a beating, for example, because he wanted to be buried in a white persons' graveyard. Another black man, born free, testified that Klan members beat him because he taught a black Sunday School. Klansmen whipped blacks who made good wages in railroad construction and forced them to return to farms where their income was significantly lower.<sup>25</sup>

The moral structure of the white community was another focus of the Klan's attention. The nightriders warned a Democrat to stop abusing his wife. Apparently he did not. Several nights later the wifebeater received a beating from the Klan. Similarly, nightriders warned Richard Roberts that he had better close his bar and stop selling whiskey on the Sabbath day. Robert's place of business was too close to the church to suit Southern propriety.<sup>26</sup>

What these varied crimes all had in common was that they violated Southern community standards. To see the black man rise economically and socially was unthinkable to whites indoctrinated to believe the Negro inherently inferior. To accept a political party which promoted political equality for the freedmen was inconceivable. To allow lapsed moral standards was impossible at a time when society seemed to be falling apart. Hugh Lennox Bond, the Federal Circuit Court Judge who presided over the South

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<sup>25</sup>Ibid., 3: 27-28; 4: 580, 5: 1705.

<sup>26</sup>Ibid., 3: 189.

Carolina Ku Klux Klan trials was correct when he observed that white South Carolinians "preferred to live in amongst this outrageous Klan rather than under the government of law."<sup>27</sup>

For white Southerners, however, the traditional mores existed with a force greater than the laws which the Yankees sought to impose. In essence, two separate and distinct legal systems struggled for supremacy in Reconstruction South Carolina. Established Southern white perceptions of what justice was and how it should be accomplished strained against the Yankee values which the Republican administration attempted to force on South Carolina. It was white supremacy versus black equality, vigilante justice and the code of honor versus the rule of law. By and large, white Southerners were convinced that the Ku Klux Klan's nocturnal raids were a necessary, if unfortunate, means of enforcing law and order and defending the South's traditional values.<sup>28</sup>

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<sup>27</sup>Ibid., 5: 1939-1974.

<sup>28</sup>The situation in South Carolina was not unlike the legal pluralism anthropologist Clifford Geertz described in third world countries where traditional local folk-ways are suddenly confronted with imported, modern (usually western) concepts of law and justice. See Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," in Local Knowledge: Further Essays in Interpretive Anthropology (New York: Basic Books, 1983), pp. 219-20. On the conflict between established custom and law see also Stanley Diamond, "The Rule of Law Versus the Order of Custom," in The Rule of Law, ed., Robert Paul Wolff (New York: Simon and Schuster, 1971), pp. 115-43.

The value system which distinguished antebellum Southern society, as both Bertram Wyatt-Brown and Edward Ayers have demonstrated, was its code of honor. Honor was possessed by the individual as a feeling of self-worth, which depended upon the opinion of others. A man became what public opinion held him to be. Fear of being shamed, more than conscience or guilt, dictated the Southerners' behavior. Honor stressed family and kin, the sanctity of white women, and the necessity, always, of defending one's good name. Slavery and race fostered the hierarchical society and bestowed honor on all white men. Taking pride that they were neither slaves nor blacks, the poorest whites "legitimized the principles of honor."<sup>29</sup> At its core, the Southern code of honor embodied white male values and demanded conformity from the women and blacks who were excluded from this fraternal system.

These white masculine values enhanced South Carolina's personal, extrajudicial approach to criminal justice and made elaborate institutional arrangements unnecessary and undesired. Antebellum South Carolina did not even need a prison, because social control was largely a community matter among whites. Dueling, fistfighting, and vigilantism were all methods of satisfying grievances or punishing

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<sup>29</sup>Wyatt-Brown, Southern Honor, passim; Edward Ayers, Vengeance and Justice: Crime and Punishment in the Nineteenth Century South (New York: Oxford, 1984), pp. 26-27.

criminals without resorting to a court of law. The person who opposed the premises of the social order could expect to be punished, but punishment was likely to be a matter of private initiative or group action rather than a governmental affair.<sup>30</sup>

Blacks, even more than whites, were outside the formal legal system in antebellum South Carolina. Since blacks were not allowed to testify against whites, masters had practically unlimited freedom to administer the lash to lazy, impudent, or otherwise troublesome slaves. Even slaves who committed serious crimes rarely found their way to the formal court system. Administration of justice was the near exclusive prerogative of the white male, a pattern which prevailed through the Civil War and Reconstruction. It was important to the ethic of honor that blacks demonstrate heartfelt respect and deference for the dominant class--indeed for all white men. A mere pretense on the part of the black robbed the white man of his honor.<sup>31</sup>

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<sup>30</sup> Michael S. Hindus, Prison and Plantation: Crime, Justice and Authority in Massachusetts and South Carolina (Chapel Hill: University of North Carolina Press, 1980).

<sup>31</sup> Eugene Genovese, Roll Jordan Roll: The World the Slaves Made (New York: Random House, 1972), pp. 25-48; Wyatt-Brown, Southern Honor, pp. 362-401. On slave law see Hindus, Prison and Plantation; Daniel J. Flanigan, "Criminal Procedure in Slave Trials in the Antebellum South," Journal of Southern History 40 (November 1974): 337-64; A.E. Keir Nash, "Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South," Virginia Law Review 56 (February 1970); and A.E. Keir Nash, "Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution," Vanderbilt Law Review 32 (January 1979).

If the Ku Klux Klan rode to support traditional local values, as Charles Flynn has suggested, the value system which the Klan's violence enforced was Southern honor--the sacred, ethical rules of the white male order. The code of honor encompassed all the various crimes which the nightriders committed. Honor dictated that freedmen be kept in a servile position. Honor demanded the suppression of the Republican Party. And honor prescribed how men and women should behave.

Although the Ku Klux Klan Reports are replete with evidence, historians have directed little attention to the Klan's violence against women. Both black women and white suffered at the hands of the nightriders, although blacks were victimized far more often. These attacks, like the crimes Klansmen perpetrated on men, supported the usual white masculine values: the integrity of the white family and determination to keep the blacks in their accustomed place.

The Southern code of honor dictated expected gender behavior for white Southerners. White males demanded absolute chastity from their unmarried daughters, submission and unerring faithfulness from their wives. Southerners considered women to be both physically frail and childlike, a condition which rendered them easy to manipulate and morally weak. Women obviously required strong male protectors. Since a "tarnished woman" brought public shame

to her menfolk, the Southern system suppressed the white woman's sexuality and encouraged the familiar double standard. Lustfulness was an accepted fact of life for the male; a healthy sex life presumably prepared the young man for marriage. For the married white Southern male, discretion was more important than fidelity. The object of white male passion--outside the marriage union--was very often the black woman. Indeed, the presence of so many blacks supported the sexual double standard.<sup>32</sup>

Racial amalgamation, all whites agreed, was unthinkable; black blood would taint the bloodlines of the master race. So strong was this taboo against racial mixture that the presence of any black blood in the veins made a person a Negro. Despite these strong legal and moral pronouncements against miscegenation, the number of mulattos increased steadily. White men blamed their weakness for black women on the concept of the blacks' aggressive sexuality and animalistic nature. Since blacks were so lascivious, white men could hardly be blamed for succumbing to the charms of black women. At the same time, whites believed the aggressive promiscuity of the Negro race dictated unwavering attention to the purity of white women. White men were certain that blacks lusted after their women.

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<sup>32</sup>Wyatt-Brown, Southern Honor, pp. 292-300; cf Winthrop D. Jordan, White Over Black: American Attitudes Toward the Negro, 1550-1812 (Chapel Hill: University of North Carolina Press, 1968), pp. 148-49.

These racial fears, as Winthrop Jordan has suggested may have been a matter of transference or projection of their own sexual attitudes. It is more likely that these fears for the safety of white women masked the white male fear of humiliation by the black. There was no greater offense to the white man's honor than the spoilation of his women.<sup>33</sup> No one has yet proved that black men were particularly interested in white women, yet the notion persisted well into the twentieth century, as lynch mobs rode to protect the Southern lady from the "black beast rapist."

Although the Ku Klux Klan Reports for South Carolina reveal no instance where a black man was accused of raping a white woman, this traditional Southern fear was nonetheless at least partially responsible for Klan outrages. During a particularly savage attack, Klan members accused Elias Hill, a hopelessly crippled black preacher, of encouraging black men to ravish all the white women. Across the border in North Carolina, attorney David Schenck wrote that the Klan's purpose, among other things, was "to protect female virtue from negro violence or his embraces." If black rape of white women was not a problem in South Carolina, Klan members served warning that no racial mixing between black men and white women--however willing the women might be--would be tolerated. Six to eight nightriders shot a black

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<sup>33</sup>Jordan, White Over Black, pp. 136-54; Wyatt-Brown, Southern Honor, p. 388.

man on the steps of the house where he allegedly lived in adultery with two white spinsters. The Klan Reports do not report the fate of the two white women. If they escaped the wrath of the Klan they were fortunate. Their sexual aberration had shamed the entire white community.<sup>34</sup>

Another white woman received hideous treatment from the nightriders. She was discovered hiding two black men under the floor of her home. The two men managed to escape, but Klan members ordered the woman out of her house, forced her to lie down on the road, then poured hot tar into her private parts and ordered her to leave town within three days. The Klan Reports give no indication of the woman's moral character or the relationship she held with the black men. Since the crime was obviously premeditated, one can only assume the worst.<sup>35</sup> This atrocity was a graphic statement that emancipation did not change the traditional Southern sexual mores. Black men were off limits for white women.

Just as the Ku Klux Klan's attitude toward white women reaffirmed the South's moral structure, so too did Klan outrages restate the white male's traditional power over

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<sup>34</sup>KKK Reports, 3: 212, 5: 1407; David Schenck Journal, 18 December, 1869, Southern Historical Collection, University of North Carolina, Chapel Hill. For an excellent assessment of white male reaction to interracial sex between white women and black men see Trudier Harris, Exorcising Blackness: Historical and Literary Lynching and Burning Rituals (Bloomington: Indiana University Press, 1984).

<sup>35</sup>KKK Reports, 5: 1864-65.

black women. Nightriders threatened and cursed black women, knocked them down and kicked them around, pistol whipped them, beat their heads against the walls of their homes, whipped them by the hundreds, and sometimes subjected them to rape. Testimony revealed that attacks on black women were likely to be as severe as the crimes perpetrated against black men--thirty to forty hard licks with a hickory was not at all unusual. Jane Surratt, for example, testified that Klansmen complained that she did not work hard enough. For her poor working habits the nightriders gave her forty lashes with sticks as large as her thumb. Wounded from her ankles all the way up her backside, the woman was unable to hold her baby on her lap. She had to stand beside the bed to nurse the child.<sup>36</sup> Samuel Bonner testified that Klansmen whipped his mother and sister as hard as they did him. The reason the white men gave for whipping the old woman: "D\_\_n her, she is a nigger; just whip it on her."<sup>37</sup> That the Ku Klux Klan demonstrated no respect for black women is not surprising. The lash had been an accepted fact of life during slavery.

Like the whippings, the sexual assaults which Ku Klux Klan members committed on black women were a restatement of the white male's traditional authority. Sexual exploitation of black women was institutionalized under slavery. Whether

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<sup>36</sup>Ibid., 3: 524-25.

<sup>37</sup>Ibid., 3: 576-77.

sexual liberties were granted as a part of the master-slave relationship or taken by brute force, the black woman was completely vulnerable to white men. Rape of a Negro woman was not a crime at law. The behavior of the Klan members demonstrated their assumption that black women were still available to them sexually. Bursting into her home late at night, Klansmen spit on Harriet Simril and threw dirt into her face until she was blinded. Adding insult to injury, the nightriders ate the food the woman had stored in her cupboard. Three of the men dragged the woman into the road and raped her in succession while the others carried on a lewd conversation. The Klansmen left the woman lying senseless in the road. Later, when the family had taken to sleeping in the woods, the Klan burned the house to the ground. Freedman Amzi Rainey watched helplessly from a loft one night while several Klansmen beat his wife and threatened to kill her if she refused to reveal her husband's whereabouts. When Rainey's small daughter begged "please don't kill my pappy," a Klan member threatened to blow the child's brains out, then shot her in the forehead, wounding her slightly. In the next room, an unspecified number of nightriders raped another daughter in full view of the other children.<sup>38</sup>

These atrocities were not simply gratification of the nightriders' lust for black women, however, nor were they

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<sup>38</sup>Ibid., 5: 1860-62, 1744-46.

primarily expressions of male power over the female. While no one could deny that the Klan's sexual attacks on Harriet Simril, Amzi Rainey's daughter, and other assorted black women violated their persons and expressed the male desire for dominance, the rape of the women appeared almost incidental to the Klan's original intent. Klan members did not ride to Simril's home hoping to find a black woman to rape. Rather, they came looking for her husband, a Radical Republican. They claimed they would have nothing further to do with the husband if he would just promise to vote the Democratic ballot. The rape of Harriet Simril was as much a political crime as a crime against women. Similarly, Klan members did not break into the home of Amzi Rainey to ravish his daughter. Their business was with the man of the house.<sup>39</sup> With few exceptions, the same rule holds true for most of the black women who were whipped. The nightriders were searching for their husbands. In short, the Ku Klux Klan did not go out looking for black women to exploit. Had that been their purpose, there would have been many more sexual atrocities. The outrages upon black women were part and parcel of the white males' efforts to render black men powerless.

Women from time immemorial, have been considered the property of men, an attitude that was still prevalent in the male-dominated, patriarchal society of nineteenth century

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<sup>39</sup>Ibid., 5: 1860-61.

South Carolina. The abuse of a man's possession--his wife--was, by extension, an attack on the man. In addition to this male perception of women as property, Southern white males believed that their personal moral worth resided as much in their women as in themselves. Thus an attack on wife, mother, or sister, according to Wyatt-Brown, was the same as an attack on the man. A man, in other words, was subject to rape through his women. By whipping and raping the wives and daughters of black men, Ku Klux Klan members were making a ritualized statement of the black male's powerlessness. The man who whipped or raped a black female, as Susan Griffin put it, simultaneously aggrandized his own manhood and reduced that of another. Ku Klux Klan violence against black women, like other Klan crime, served as reaffirmation of community values, the particular value in question here being white male authority.<sup>40</sup>

Indeed white male authority was the driving force behind the entire value system of Reconstruction South Carolina. The unchallenged political power of the white

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<sup>40</sup>Wyatt-Brown, Southern Honor, p.53; Susan Griffin, Rape: The Power of Consciousness, (San Francisco: Harper & Row, 1979), pp. 17-19; Nell Irvin Painter, "'Social Equality,' Miscegenation, Labor, and Power," in The Evolution of Southern Culture, ed. Numan V. Bartley (Athens: University of Georgia Press, 1988), pp. 58-63; Jacqueline Dowd Hall, "The Mind that Burns in Each Body: Women, Rape, and Racial Violence," Southern Exposure 12 (November 1984): 61-65; Trudier Harris, Exorcising Blackness, pp. x-xi, 2-3; Elizabeth Fox-Genevieve, Within the Plantation Household: Black and White Women in the Old South (Chapel Hill: University of North Carolina Press, 1988), pp. 294-95.

man, the sanctity of the white family, the unfeigned submission of white women and all blacks, the continuity of things as they had always been--these were the important things in life. Antebellum tradition was too firmly entrenched to give way simply because outsiders wanted to establish Yankee values and a rule of law. White South Carolinians resisted the federal government, the black state militia, and the inevitability of change in the traditional Southern way--with violence.<sup>41</sup>

The Ku Klux Klan's ritualistic vigilante justice cleansed the community of impurities and upheld the proper standards of conduct. If many South Carolinians believed the Klan's methods too extreme, with violence inexorably breeding more violence, they nevertheless agreed that the organization's purpose was necessary reaffirmation of local values in the face of imminent danger. "Of course whites adopted some plan of counter-organization," Professor John Leland wrote in 1879: "They would have been less than men, if they had left their family hearths, and their wives and children, exposed to all manner of violence and insult, without some scheme."<sup>42</sup> The masked nightriders of South

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<sup>41</sup>On violence as a tradition in the South, see, for example, W.J. Cash, The Mind of the South (New York: Knopf, 1941); Sheldon Hackney, "Southern Violence," American Historical Review 74 (February 1969): 906-25; Richard Maxwell Brown, Strain of Violence: Historical Studies of Violence and Vigilantism (New York: Oxford, 1975); Ayers, Vengeance and Justice; and Wyatt-Brown, Southern Honor.

<sup>42</sup>Leland, Voice from South Carolina, pp. 55-56.

Carolina's Ku Klux Klan, in their own minds, rode to protect themselves, their womenfolk, and their local customs from encroaching outside authority. The unprecedented wave of violence they sustained was all for the sake of honor and tradition.

Because the majority of white South Carolinians supported the goals of the Ku Klux Klan, the state's criminal justice system was inadequate to stop the violence. Blacks who dared to report the crimes perpetrated against them often found that the local trial justices turned a deaf ear to their complaints. These magistrates, appointed by the Governor, were sometimes white Democrats who were personally involved in Klan activities. Others acquiesced silently to the goals of the Klan, refusing to use their authority to investigate outrages or issue warrants. These officials had earned a bad reputation with Freedman's Bureau officers, one of whom reported that they were "afraid to enforce the laws or will not risk their positions in society by attempting to arrest criminals who have only injured colored men." Generally speaking, as another Freedman's Bureau Officer put it, when a freedman was the "aggressor" in a quarrel with a white man, public opinion acquitted the white of any guilt "without the tedious formality of a judicial examination." Republican trial justices, on the other hand, many of them ignorant blacks, were threatened, intimidated, and sometimes even murdered when they attempted

to uphold the rights of the freedmen. John Hubbard, Chief Constable for the State, reported to Governor Scott in February 1871 that trial justices had been brutally murdered in Union, Spartanburg, and Laurens Counties. Many other county officials were forced to resign. When Ku Klux Klan terrorism was at its peak, local magistrates simply "did not dare to take up the cases and proceed with them." <sup>43</sup>

When blacks did get their day in court, they still found it extremely difficult to obtain justice. State law denied to blacks the right to testify against whites before the War, and the Fourteenth Amendment's equal protection clause had not changed Southern minds. In cases where whites were tried for crimes against freedmen, the whites were often acquitted despite the evidence against them. In some cases, the attorneys were "sure to impress upon the jury that the evidence just taken is nigger and they must not believe it before white evidence." The presence of blacks in the jury did little to alleviate the situation. According to David T. Corbin, Federal Attorney for South Carolina, racially mixed juries usually split along strictly

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<sup>43</sup> Williamson, After Slavery, pp. 330-32; Report of William Stone, 1 October 1868, BRFAL, RG 105, M869, Roll 36, NA; Hubbard to Scott, 14 February 1871, Governor Scott Papers, South Carolina Department of Archives and History; William Stone to Major H. Neide, 19 September 1868, BRFAL, RG 105, M869, Roll 18, NA; Testimony of David T. Corbin, KKK Reports, 5: 69-70.

political lines, again despite the evidence, resulting in hung juries and mistrials.<sup>44</sup>

When blacks were accused of crimes, the picture was likely to be very different. Retribution against black criminals was apt to be swift and terrible, whether it was informal and extralegal or within the state's judicial system. H.E. Hayne of Marion County reported to Governor Scott in late 1868 that several blacks were being held unduly for petty crimes. One freedman, for example, had already been locked up seven months awaiting trial for stealing a bushel and a half of peas. Another black, accused of hog stealing, had been denied the right to have his witnesses heard when he was tried in District Court. A third was falsely accused of stealing some bacon from his employer, then indicted for stealing a plough (which he had purchased) found in his possession. In each of these cases, Hayne insisted, the freedman was indicted primarily "because he would not sell his principles to his employer." Stealing was apparently a serious problem among the freedmen, as it is likely to be among poor people anywhere, but the evidence suggests that whites accused some blacks falsely of stealing goods they had come by honestly, in order to have them incarcerated. Hayne, a white Republican, made this connection as did Edward Lipscomb, a yeoman farmer from

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<sup>44</sup>Report of William Stone, March 1867, BRFAL, RG 105, M869, Roll 35; Report of J.B. Dennis, December 1867, BRFAL, RG 105, M869, Roll 18, NA; KKK Reports, 5: 69.

Spartanburg County, who put the matter bluntly: "We think in the year 1870 we will be able to chang [sic] the law making power for the negroes are leaving the upper districts a grate [sic] many has run away for stealing and a heap goes to the penotensuary [sic] & all that is convicted for stealing is done voting."<sup>45</sup>

A white population which was willing to imprison freedmen unjustly to prevent them from voting was obviously not going to exert itself to bring the nightriders of the Ku Klux Klan to justice. Indeed, many whites insisted that the Klan did not even exist. One freedman who attempted to prosecute his assailants was tried for perjury and false arrest and landed in the penitentiary.<sup>46</sup> No serious investigation of Klan atrocities was attempted until the United States Army sent Major Lewis Merrill to York County. Initially skeptical concerning the level of both Klan brutality and community consensus among the whites, Merrill soon learned that the violence surpassed anything the Republican government had imagined. Merrill documented eleven murders and over 600 whippings in York County, yet the civil authorities in the County were entirely unwilling to address the problem. When the county grand jury met in

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<sup>45</sup>H.E. Hayne to Scott, 9 October 1868, Gov. Scott Papers, South Carolina Department of Archives and History; Edward Lipscomb to Smith and Sally Lipscomb, 30 June 1869, Edward Lipscomb Papers, Southern Historical Collection, University of North Carolina, Chapel Hill.

<sup>46</sup>KKK Reports, 5: 1487, 1552-53.

September 1871, Merrill reported, "the whole effort appeared to be to devise some means of avoiding the knowledge" which he tried to furnish them. According to Merrill, at least one third of the members of both the grand and petit juries were members of the Ku Klux Klan, some of them high level officers; at least two grand jury members had been accessory to Klan murders. The few members of the grand jury who were really interested in doing their duty were "browbeaten and overruled by the rest." Not surprisingly, the court session ended with no relief for the victims of the Ku Klux Klan. Indeed, Merrill labeled the grand jury proceedings "so broad a farce that it was very distasteful to be forced in contact with it."<sup>47</sup>

With local civil officials all over the upcountry, as Major Merrill put it, "either in complicity with the Ku-Klux conspiracy, or intimidated by it," federal effort would be required to stop the Klan and restore the civil and political rights of its victims. Governor Scott appealed to President Grant for help. Despite his fears of being labeled a military dictator, Grant moved quickly to restore order. Acting under authority of the Ku Klux Klan Act of April 1871, the President declared a nine county area of Piedmont South Carolina to be in a state of rebellion, then two weeks later on October 17, 1871, the President suspended

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<sup>47</sup> Report of Major Merrill, KKK Reports, 5: 1599-1606; Presentment of York County Grand Jury in KKK Reports, 5: 1611-12.

the writ of habeas corpus in those nine counties, facilitating mass arrests without the usual niceties of procedure. All over the upcountry local whites screamed about being torn from their homes unjustly in a time of "profound peace."<sup>48</sup>

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<sup>48</sup>Report of Major Merrill, KKK Reports, 5: 1601-02.

## CHAPTER 3 FEDERAL INTERVENTION AND SOUTHERN RESISTANCE

The absolute powerlessness of the Republican State Government under Robert K. Scott to suppress the Klan's terrorism, provide justice for the freedmen and native white Republicans, and restore law and order moved the upcountry inexorably toward federal intervention. Scott may have been overly cautious, as Otto Olsen has suggested of Republican leaders in general, but the Governor found himself in an untenable position. He was well aware that the majority of the white citizens of the state considered his government illegitimate and either openly supported the goals of the Ku Klux Klan or silently acquiesced to its reign of terror. Scott recognized, moreover, the futility of declaring martial law or calling out the militia, when the militia was one of the primary points of contention and the opposition consisted of mounted, trained ex-Confederates already committed to disarming the black troops. The use of black troops was certain to incite further racism. Instead Scott attempted to reason with the white state leaders. The whites promised peace in return for disarmament. True to his word, Scott disarmed and disbanded the black troops,

only to find that he had exchanged the freedmen's means of protection for empty assurances.<sup>1</sup>

Scott's position was as precarious among the members of his own party as among the whites. Threatening impeachment, the Republican members of the state legislature passed a joint resolution in January, 1871, demanding to know why the governor had not called out a militia force sufficient to dispel the violence in the upcountry. Fearful of returning to the upcountry where their lives were forfeit, many of the state lawmakers were virtual prisoners in the state capital. Scott made public pronouncements which discounted the need for armed forces in a time of "profound peace." "Such a remedy," Scott stated, "would be as bad as the disease, and would be a public declaration that there was no Civil Government in South Carolina, and that we are living in a condition of social anarchy." Privately, however, Scott sought federal assistance for his strife ridden state.<sup>2</sup>

Klan violence in South Carolina and throughout the South had spurred congressional Republicans to provide

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<sup>1</sup> Robert K. Scott to U.S. Grant, [November 1871], Robert K. Scott Papers, Ohio Historical Society, Columbus, Ohio; Otto H. Olsen, "Southern Reconstruction and the Question of Self-Determination," in A Nation Divided: Problems and Issues of the Civil War and Reconstruction, ed. George M. Fredrickson (Minneapolis: Burgess, 1975), pp. 136-37. For an excellent narrative of events in South Carolina see Trelease, White Terror, pp. 362-80.

<sup>2</sup> Yorkville Enquirer, 19 January 1871; Robert K. Scott to the Senate and House of Representatives, 16 January 1871, Governor Scott Messages, Green Files, Legislative System, South Carolina Department of Archives and History.

statutory authority to protect the freedmen and enforce the Fourteenth and Fifteenth Amendments. These extraordinary laws--the Force Acts--expanded the power of the federal government in relation to the states and provided a legal basis for the federal intervention Governor Scott sought. The First Enforcement Act of May 31, 1870, stated that citizens otherwise qualified to vote were entitled to do so without regard to race, color, or previous condition of servitude. Although directed primarily toward discriminatory state interference with black suffrage, the law recognized that inaction or neglect by a state was often the problem. It therefore prohibited private interference with the right to vote. An important section (section 6) aimed specifically at the Ku Klux Klan made it a felony to conspire or ride the public highways to deprive any citizen of "any right or privilege granted or secured to him by the Constitution or laws of the United States," or to punish him afterward for having exercised it. Another highly controversial section (section 7) extended federal power to ordinary crimes committed by Klansmen in the process of violating other sections of the law. Thus a member of the Klan who committed murder, for example, could be tried and convicted in federal court, the punishment to be commensurate with that provided by state law. The law reenacted the Civil Rights Act of 1866 under the authority of the Fourteenth Amendment and guaranteed black citizens

"full and equal benefits of all laws and proceedings for the security of person and property."<sup>3</sup>

The First Enforcement Act of 1870 failed to affect the situation in South Carolina. Instead the violence in the upcountry escalated. With no attempts made to enforce the law, the Klansmen were totally unimpressed with federal efforts. President Grant responded to the pleas of Governor Scott and others in March 1871 by sending additional federal troops under the command of Major Lewis Merrill to Spartanburg, Union, and York Counties. The troops calmed the problems in the towns where they were stationed, but had little or no effect on the violence in the countryside. Indeed several murders in York County were actually committed after the arrival of the troops.

Continued reports of outrages throughout the South, and particularly in upcountry South Carolina, produced a growing public demand for a stronger enforcement act. President Grant provided Congress all the information he had pertaining to the Klan to encourage the Republican lawmakers

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<sup>3</sup>U.S. Statutes at Large, 16, 140-46. See also Hyman, A More Perfect Union, p. 526; Belz, Emancipation and Equal Rights, pp. 126-27; Swinney, "Suppressing the KKK," pp. 57-58; William Watson Davis, "The Federal Enforcement Acts," in Studies in Southern History and Politics Inscribed to William Archibald Dunning (New York: Columbia University Press, 1914), pp. 207-12. The Second Enforcement Act of February 1871 provided national supervision for congressional elections. It was framed primarily to curb election fraud in the North and was not used in the Ku Klux Klan trials in the South. U.S. Statutes at Large, 16: 433-40.

to act. Congress appointed a special joint committee to investigate the problems in the South. Initially limiting its investigation to North Carolina, the committee confirmed the worst reports on conditions in the South. Despite their increased understanding of the Klan, however, the Congressmen adjourned without providing any new power to deal with the problem. Believing that the role of the president was primarily to execute the will of the people as expressed through their congressmen, and doubtful that the present law afforded him sufficient authority to halt the Klan, President Grant called the new national legislature into special session in March, 1871. Congress balked initially, then acted on the "urgent" written request of the President to provide legislation to "effectually secure life, liberty, and property and the enforcement of law in all parts of the United States." Congress passed on April 20, 1871, a tough new law designed to enforce the provisions of the Fourteenth Amendment.<sup>4</sup>

The Ku Klux Klan Act, like the First Enforcement Act, attempted to provide a remedy for private lawlessness. Whether Congress believed it had constitutional authority to

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<sup>4</sup>Arthur Zilversmit, "Grant and the Freedmen," in New Perspectives on Race and Slavery in America: Essays in Honor of Kenneth M. Stampp, ed. Robert H. Abzug and Stephen E. Maizlish (Lexington: University Press of Kentucky, 1986), p.133; Trelease, White Terror, pp. 383-88; U.S. Grant to the Senate and House of Representatives, 23 March 1871, in James D. Richardson, ed., A Compilation of the Messages and Papers of the Presidents (New York: Bureau of National Literature, 1897), 9: 4081-82.

protect blacks from private aggression, as Laurent B. Frantz argued, or felt compelled to remain within the state action theory of federal power under the Fourteenth Amendment, as Alfred Avins maintained, is unclear. In either case, the statute outlawed conspiracies to deny civil rights.

Furthermore, the law increased the power of the President to use military force to suppress domestic violence which deprived citizens of their "rights, privileges, or immunities, or protection named in the Constitution." When such violence existed, the president was authorized to suspend temporarily the writ of habeas corpus. The president could send federal troops with or without the state's request.<sup>5</sup> Democrats and conservative Republicans complained that the law exceeded federal constitutional authority over individuals and worried about the extended power of the president. Indeed, Democrats in Congress were more concerned about federal encroachment than about the atrocities committed by the Ku Klux Klan. Radical Republicans, however, perceived the Klan to be a political

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<sup>5</sup>The authorization to suspend habeas corpus expired at the end of the next regular session of Congress in 1872 and was never extended. U.S. Statutes at Large, 17: 14-15; Laurent B. Frantz, "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts," Yale Law Journal 73 (July 1964):1354-57; Alfred Avins, "The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment," St. Louis University Law Journal 11 (Spring 1967): 377-79.

threat of a public nature and planned to use the full extent of their power to combat it.<sup>6</sup>

Following the passage of the Ku Klux Klan Act, the Forty-Second Congress expanded the role of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States to investigate the rumors of Klan activity throughout the South. Congress' purpose in forming the committee is not entirely clear. The Justice Department and the Secretary of War were already taking steps to enforce the new law before the committee began its work. Congress probably intended, as Alan Trelease has pointed out, the committee to confirm the necessity of the Klan Act and the controversial task of enforcing it. The committee produced thirteen volumes of evidence which covered every aspect of Southern life and remain the most fertile source of information on the reconstruction South. The subcommittee of three who investigated conditions in South Carolina interrogated people of every station in life from Confederate heroes and Democratic leaders to the humblest freedmen. Although white leaders discredited the atrocity stories and professed no knowledge of the Klan's nocturnal activities, eyewitness accounts confirmed again and again the enormity of the problem and the complete failure of the state government to restore order. The Ku

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<sup>6</sup>Swinney, "Suppressing the Ku Klux Klan," pp. 166-70; Belz, Emancipation and Equal Rights, p. 129; Davis, "Federal Enforcement Acts," p. 212.

Klux Klan Reports stand today as solemn testimony to the brutality of the white race and the total breakdown of law and order in reconstruction South Carolina.<sup>7</sup>

Attorney General Akerman decided that the United States Justice Department would also conduct an investigation of affairs in South Carolina. A recent appointee, Akerman was the first Attorney General to administer a department of his own. The Justice Department had been formally created in July 1870, at least partially to stop the flow of government money to expensive special counsel. The attorney general and his assistants were to perform all legal services necessary to enable the other departments of government to discharge their duties. The attorney general directed the activities of the district attorneys and all other legal officers, supervised their accounts and expenses, made rules and regulations for the management of the new department, and reported annually to Congress--all this in addition to writing legal opinions and arguing cases in the Supreme Court.<sup>8</sup> The work load would have been great under any

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<sup>7</sup>On the work of the committee see Trelease, White Terror, pp. 392-95. The report of the subcommittee for South Carolina filled three volumes. The third volume (Volume 5 of the KKK Reports) contains a verbatim report of the U.S. Circuit Session in November and December, 1871, when the first group of Klan trials for South Carolina was held.

<sup>8</sup>Akerman replaced Ebenezer Rockwood Hoar, Grant's first Attorney General, who had lost the support of the Senate by writing opinions unfavorable to the Radicals and failing to consult the senators on his candidates for district attorneys and judges. Needing Southern support for his Santo Domingo Treaty, Grant asked Hoar to resign to enable

circumstances, but the large number of enforcement act cases swelled the Department of Justice's burden to unmanageable proportions.

The only former Confederate to reach cabinet rank during reconstruction, Attorney General Akerman was a man totally committed to the goals of the Republican Party in enforcing the Fourteenth and Fifteenth Amendments. Born and educated in the North, Akerman had migrated to Georgia after finishing Dartmouth. There he taught school while he studied law with former attorney general John M. Berrien. Akerman remained loyal to his adopted state during the war, even to the point of volunteering for the Confederate forces. After the War, however, Akerman considered it a point of honor to lay down his loyalty to the old South along with his arms. He recognized, as he put it, that "a surrender in good faith really signifies a surrender of the substance as well as of the forms of the Confederate cause." Unlike most of the other Confederates who "consulted the past rather than the future" and let "resentment rather than reason" determine their politics, Akerman joined the Republican Party because he considered their ideas "both expedient and right." The position of United States district attorney for Georgia was Akerman's first reward for

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him to appoint a Southerner to a cabinet position. See Homer Cummings and Carl McFarland, Federal Justice: Chapters in the History of Justice and the Federal Executive (New York: Macmillan, 1937), pp. 225-29.

his change of heart. Congress granted a special dispensation because the lawyer was unable to take the test oath required of federal officers. Akerman's vigor in prosecuting violations of the Civil Rights Act of 1866, added to his efforts to build a strong Republican Party in the South, earned him the position on the national cabinet when Grant needed a Southern candidate.<sup>9</sup>

Akerman traveled to South Carolina to investigate personally the reports of atrocities in the upcountry. He first stopped in the state capital to consult with Governor Scott, South Carolina Attorney General Daniel H. Chamberlain, United States District Attorney David T. Corbin, and Major Lewis Merrill, Commander of U.S. Troops in York County. Fully concurring with Akerman's plans to implement enforcement procedures in South Carolina, Governor Scott was able to advise the Attorney General about which counties should be included in the proposed suspension of habeas corpus. From Columbia, Akerman traveled to Yorkville where he spent over two weeks with Corbin and Merrill reviewing the evidence Merrill had gathered and examining witnesses. Merrill's evidence demonstrated that "the worst

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<sup>9</sup>Akerman to James Jackson, 20 November 1871, Amos T. Akerman Papers, University of Virginia, Charlottesville, VA. An excellent assessment of Akerman's career is William S. McFeely, "Amos T. Akerman: The Lawyer and Racial Justice," in Region, Race, and Reconstruction: Essays in Honor of C. Vann Woodward, ed. J. Morgan Kousser and James M. McPherson (New York: Oxford University Press, 1982), pp. 395-415. See also William S. McFeely, Grant: A Biography (New York: W.W. Norton, 1981), pp. 367-74.

reports which had been heretofore made of the power and of the infernal purpose and conduct of the order fell far short of the facts." Akerman left South Carolina convinced that "from the beginning of the world until now," no community "nominally civilized, has been so fully under the domination of systematic and organized depravity." The Ku Klux "combinations amount to war," Akerman concluded, "and cannot be effectively crushed on any other theory." Accordingly, Akerman recommended to President Grant that he use the full extent of his powers under the recent act of Congress to suppress the Ku Klux Klan in South Carolina.<sup>10</sup>

It was evidence painstakingly accumulated by Major Lewis Merrill which had convinced Akerman of the necessity of federal intervention; indeed, Major Merrill was the person primarily responsible for uncovering evidence which would enable the federal government to bring the Klansman to justice. Merrill had begun his investigation of the Klan upon his arrival in York County in March, 1871. Initially incredulous, Merrill gradually began to recognize that Klan brutalities surpassed anything which the government authorities had perceived, although accumulating evidence was no easy matter in York County where most of the white population was committed to the Klan's goals. Merrill used

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<sup>10</sup>Report of Major Merrill, KKK Report, 5: 1602; Akerman to Gen Alfred H. Terry, 18 November 1871, and Akerman to B.D. Silliman, 9 November 1871, Amos T. Akerman Papers, University of Virginia, Charlottesville, VA; New York Times, 31 October 1871; Trelease, White Terror, pp. 402-3.

spies hired by the Justice Department and spent a "moderate sum" of money which he obtained from the Governor to "supply all the missing links in my chains of evidence." Perhaps more important, he sheltered victims of the Ku Klux Klan in the army camp where they were protected from the consequences of relating information to the federal officer. Merrill accumulated reliable evidence of some eleven murders and over 600 whippings and other brutal outrages in York county alone. This was the information he had furnished to the York County Grand Jury which had so studiously avoided recognition of a "carnival of crime not parallel in the history of any civilized community."<sup>11</sup>

Attorney General Akerman was thoroughly impressed both with Major Merrill and with the job he had done. Akerman considered the Major "bold, prudent with a good legal head, very discriminating between truth and falsehood, very indignant at wrong, and yet master of his indignation." In short, Merrill was "just the man for the work." The information Merrill furnished Akerman convinced the Attorney General that "the local law is utterly unable to cope with the criminals." He called for measures to put fear in the hearts of white Southerners. The Republican Government was in the South by right, he had previously insisted, "and not by tolerance of the population." Thus in Akerman's opinion

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<sup>11</sup>Lewis Merrill to R.K. Scott, 17 July 1871, Robert K. Scott Papers, Ohio Historical Society; Report of Major Merrill, KKK Report, 5: 1599-1606.

"nothing is more idle than to attempt to conciliate by kindness that portion of the Southern people who are still malcontent. They take all kindness on the part of the Government as evidence of timidity and hence are emboldened to lawlessness by it." If it was impossible for the federal government to win the affection of the South, it could, nonetheless, command its respect by exercising the full extent of its powers under the law. When Akerman left South Carolina he met with the president to recommend vigorous enforcement of the laws.<sup>12</sup>

Although sensitive to the charge that he was a military despot, President Grant determined to do everything in his power to stop the lawlessness in South Carolina. Following the recommendation of Akerman and Senator John Scott, Chairman of the Joint Congressional Investigating Committee, Grant issued on October 12, 1871, a proclamation which commanded "all persons composing the unlawful combinations and conspiracies" to turn their weapons and disguises over to a United States marshal and disperse to their homes within five days. This initial proclamation was required by law before the writ of habeas corpus could be suspended. As expected, the proclamation was ignored by Klansmen in South Carolina. Thus the President issued a second proclamation

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<sup>12</sup>Akerman to E.P. Jacobson, 18 August 1871; Akerman to B.D. Silliman, 9 November 1871; Akerman to Gen. A.H. Terry, 18 November 1871, all in Amos T. Akerman Papers, University of Virginia.

on November 17, which declared a nine county area of upcountry South Carolina to be in a state of rebellion. Grant suspended habeas corpus in those counties, an act which was absolutely unprecedented in the United States during peacetime.<sup>13</sup> The suspension of habeas corpus (which news papers throughout the South insisted on calling martial law) facilitated mass arrests without the usual niceties of procedure--finally bringing the violence in the upcountry to a temporary halt.

The suspension of habeas corpus and subsequent arrests spread fear and panic throughout upcountry South Carolina. Government efforts centered initially in York and Spartanburg Counties. Federal marshals, assisted by the Seventh Cavalry, spread out from Yorkville into the county, depending upon the element of surprise to catch the Klansmen before they had a chance to flee. The officers had done their homework. Mary Davis Brown of Bersheba Community reported in her diary that several of the men from her neighborhood had been arrested at a "shucking" which had been planned for the young people. Several others, however, decided to forego their social life when they heard about

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<sup>13</sup>The counties were Spartanburg, York, Marion, Chester, Laurens, Newberry, Fairfield, Lancaster, and Chesterfield. Richardson, Messages and Papers, 9: 4089-4092. Marion County was a mistake. Grant issued another Proclamation on November 3 substituting Union County for Marion. Ibid., pp. 4092-93. On Grant's sensitivity to the charge of being a military dictator see Zilversmit, "Grant and the Freedmen," p. 134, and McFeely, Grant, p. 370.

Grant's proclamation. Large numbers of arrests were made quickly, most of them in the daytime, and with very little resistance. The nightriders were locked up without being formally charged while the United States officials concentrated on hunting down more of the Klan members, a task which became more and more difficult as the Ku Klux took to the mountains. Many of the more affluent Klansmen had already fled the country as soon as Grant issued his initial proclamation. Others left when word got out that federal officers had commenced rounding up the criminals. Thus Major Merrill reported that many of the most wanted criminals were known to be as far away as Canada, Texas, and Pennsylvania. John W. Avery who was head of a Klan and the person most responsible for planning and executing the murder of Jim Williams, a black militia captain, for example, had fled to London, Ontario, where he was staying with the Manigault family, also formerly of York County.<sup>14</sup>

Many Klansmen who did not flee decided to surrender; several whole Klans turned themselves in to the federal officials simultaneously. It strained the resources of the officers in charge attempting to take confessions from the "pukers" as they were called. Many of those who puked were

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<sup>14</sup>Report of Major Merrill, KKK Reports, 5: 1602-3; Mary Davis Brown Diary, 17 October 1871, South Caroliniana Library, University of South Carolina; Trelease, White Terror, pp. 403-6. See also Statement of Dr. Bratton's Case, Being Explanatory of the Ku-Klux Prosecutions in the Southern States (London, Ontario: Free Press, 1872).

poor, ignorant country boys who had been coerced or threatened into the Klan by leading citizens. Resenting the flight of the leaders who left them to take the brunt of the government program, these reluctant nightriders took the opportunity to tell all they knew. In this manner Major Merrill learned of six murders in York County which his previous investigations had failed to uncover. Most of those who surrendered voluntarily were allowed to return home after they had made their statements, but some of them had committed outrages of such deep criminality that they were incarcerated along with those the government arrested. A few of those who made voluntary confession asked to be arrested to avoid the Klan's retribution for their action. Some were allowed clemency for turning states witness.<sup>15</sup>

It is difficult to overestimate the effect of the arrests on the upcountry, particularly York County where the government was most active. Since the majority of the white males were involved in the Klan, almost every family was affected. After venturing to town to see what she could learn about the government's intentions, Mary Brown reported that the streets were deserted. Merchants were boxing up unsold goods to send back to the distributors. Business was ruined. The suspension of habeas corpus had a similar

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<sup>15</sup>Major Merrill's Report, KKK Reports, 5: 1602-4: D.T. Corbin to A.T. Akerman, 13 November 1871, Source Chronological Files, South Carolina, Record Group 60, M947, National Archives (hereafter cited as S.C.F., S.C.).

effect in the countryside. Families were separated. Women and children were left to cope with farm chores without the assistance of their menfolk. Mary Brown's diary is a written testimony to the fear and excitement that overcame the upcountry as federal troops commenced making the arrests. "Oure children and grandchildren is all under oure roof tonight," she wrote, "but it has the apperance that it may all never meet again." Her sons fled, leaving a "broken harted Farther & Mother." Her daughters, too, were heartbroken as fiances left for "parts unknown." Other family members and friends "put on their hats this evening and steped off," with no knowledge of when they might be able to return. A praying woman, Brown committed each of these loved ones to the care of the Lord. "Enabel me." she pleaded, "to say thy will be done." Mrs. Brown was not the only person driven to prayer. She related a scene which she had "had never seen ore heard before." She witnessed her uncle Bille as he knelt "in prayer before Almighty God pleading with him fore his care & protection in these times of sorrow and trouble. I pray God that he will make him faithful in his good work," she continued, "so that manny more will follow his exampell so that it can be said of Bershaba they are a praying people."<sup>16</sup>

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<sup>16</sup>Mary Davis Brown Diary, 15, 16, 17 October 1871, 10 November 1871, South Caroliniana Library, University of South Carolina.

If the streets of York were emptied, the local jail house was full. Klansmen of all social classes and situations sat in jail and waited to learn what charges were made against them. The influential planter Iredell Jones complained to his wife in October that he was enduring his persecution as "the fruit of military rule to be innocent of any crime whatever, & yet be called upon to suffer a heavy penalty without even being allowed a hearing." Jones "felt keenly the responsibilities of home" and sent instructions for work to be done. Jones assured his wife that most of the men were innocent. They had been arrested on suspicion only, according to his story, "with the hope of getting testimony after arrest." He labeled the suspension of habeas corpus an illegal exercise of executive authority. Convictions would be made because of political necessity, he predicted, with false evidence and packed juries provided for the purpose. A month after his incarceration Jones was still waiting for the government to advise him what charges were made against him.<sup>17</sup> The authorities were too overwhelmed with taking confessions and making additional arrests to take time to attend to the prisoners' anxieties.

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<sup>17</sup>Iredell Jones to My Dear Wife, 22 October 1871, 30 October 1871, 15 November 1871, Iredell Jones Papers, Perkins Library, Duke University. The Iredell Jones Papers at the South Caroliniana Library contain papers, signed by Jones, authorizing the organization of a Klan in Rock Hill. See also "General Orders" for Klan business in Iredell Jones Papers, South Caroliniana Library, University of South Carolina.

The Klansmen who were stuck in jail suffered little. The government allowed them exercise and visitors after the first few days. Often they were marched through the streets of town under guard. The local women outdid themselves to provide for the prisoners' appetites, bringing baskets of all sorts of delicacies daily. Some of the captives, in fact, seemed to enjoy the attention they received as martyrs. While the men in jail protested their innocence and Democratic newspapers all over the nation decried government policy, the Yorkville Enquirer remained a voice of calm restraint. Printing the full text of both the Enforcement Act of May 30, 1870 and the Ku Klux Klan Act of April 20, 1871, the paper made clear that the government had no intention to arrest anyone innocent of crime. The Enquirer listed the names of the nightriders who had been incarcerated and generally kept the community informed, "deeming conjectures and sensational paragraphs . . . as quite superfluous, and in tendency injurious."<sup>18</sup>

The federal government achieved remarkable success in arresting only legitimate suspects. Major Merrill reported the difficulty of the task. He was unable to locate intelligent local white men to help locate suspects; to use blacks, according to his judgment, would invite resistance.

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<sup>18</sup>Iredell Jones to My Dear Wife, 24 October 1871, Iredell Jones Papers, Duke University; Leland, Voice from South Carolina, pp. 98-132; Yorkville Enquirer, 26 October 1871, 2 November 1871, 9 November 1871.

Federal officers were generally unfamiliar with the appearance of those they sought. Despite these difficulties, Merrill reported that of the 169 military arrests in York County prior to January, 1872, only nine men were taken into custody by mistake. In each case the person arrested had the same name as the one desired. All were released as soon as the mistaken identity was revealed--usually within a few hours. Approximately 200 men were incarcerated in the York County Jail for serious crimes. At least 500 more had surrendered voluntarily, given confession, and been released. Twenty had turned states evidence; six were arrested at their own request, because they were afraid to testify unless it appeared that they were forcibly required to talk. Although York County was the primary focus of the initial prosecutions, the arrests extended into several other counties, most notably Spartanburg, Union, Chester, Newberry, and Laurens. Approximately 600 men had been taken into custody by December, 1871. Most of the arrests had been accomplished by the end of the year, but they continued off and on until 1873. Despite the large numbers of arrests, however, the federal effort never touched the majority of the offenders.<sup>19</sup> The mass of prisoners caught in the federal

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<sup>19</sup>Report of Major Merrill, KKK Reports, 5: 1602; Amos T. Akerman, Annual Report, New York Times, 16 January 1872; D.T. Corbin to A.T. Akerman, 13 November 1871, S.C.F., S.C.; R.K. Scott, Annual Message, 28 November 1871, Legislative System, Green Files, South Carolina Department of Archives

net nonetheless turned out to be far too great for the courts to handle.

Anticipating the flood of business which reconstruction would bring to the federal courts, Congress had expanded the federal judiciary in 1869. The Judiciary Act of 1862 had substantially altered the regional balance on the Supreme Court and in the circuits in favor of the North. In order to strengthen the federal judicial presence in the South, without creating new Southern circuits which would add Southerners to the Supreme Court, the Judiciary Act of 1869 provided for nine independent circuit court judges, one for each of the existing circuits. The Circuit judges were required to be residents of the circuits to which they were appointed. Within their respective circuits they held the same power as the Supreme Court Judge assigned to the circuit. The law further aimed to take the load off the members of the Supreme Court. Supreme Court Judges were still required to ride circuit, but the circuit judges generally held court jointly with the district judge. Republican lawmakers hoped that this two-headed court with a judge from outside the immediate area would decrease the favoritism toward parochial interests which was usually

displayed in the district courts and enhance the national interest.<sup>20</sup>

Thus the Ku Klux Klan trials in South Carolina were to be tried jointly by High Lennox Bond of Maryland, Circuit Judge of the Fourth Federal Circuit, and George Seabrook Bryan, District Judge for South Carolina. President Grant appointed Bond to the federal bench because of his demonstrated courage, commitment, and determination to enforce civil rights for the recently emancipated freedmen. However, Judge Bond had already demonstrated that his unionism was tempered by constitutional scruples which leaned toward the states rights position. A member of an old and respected Baltimore family, Bond had grown up in New York. Returning to Baltimore after he graduated from New York University, Bond read law and was admitted to the bar in 1851. He was a founding member of the Republican Party in Maryland. From 1860 to 1868 he served as judge of Baltimore's Criminal Court. As a wartime, border-state judge, Bond balanced his personal devotion to the United States with a keen regard for the constitutional liberties of his fellow Marylanders who were deeply divided between the Union and the Confederacy. In 1861 citizens of Baltimore had mobbed the Sixth Massachusetts Regiment as it

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<sup>20</sup>Any combination of two judges could sit together or any of the judges could hold court alone. U.S. Statutes at Large, 16: 44-45; Kermit L. Hall, "The Civil War Era as a Crucible for Nationalizing the Federal Courts," Prologue: Journal of the National Archives 7(Spring 1975): 183-86.

passed through the city. Several people died, soldiers as well as civilians, and many more were wounded. In his charge to the grand jury Bond insisted that those who took part in the riot were guilty of murder. His support for the Union was clear. Bond's determination to punish all the guilty, moreover, foretold his reaction to the Ku Klux Klan. Later, however, Bond courageously instructed a grand jury to indict United States military commissioners appointed to try civilians on the grounds that Maryland was not under martial law. Here, too, Bond presaged his future actions. He upheld states rights and seriously questioned the federal government's constitutional authority to exceed its traditional powers even in wartime.<sup>21</sup>

Bond's performance on the city bench also indicated his concern for black rights. After the emancipation of Maryland's slaves, Bond used his official position to fight the vestiges of slavery. A discriminatory apprenticeship system in Maryland required that black "orphans" be bound to some white person, usually the former master. In effect, these youths were reenslaved. As many as ten thousand blacks may have been apprenticed, even though many had

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<sup>21</sup> Dictionary of American Biography, 1964 ed., s.v. "Hugh Lennox Bond;" J.G. Randall and David Donald, The Civil War and Reconstruction, 2d. ed. (Lexington, Mass.: D.C. Heath, 1969, pp. 195-96. On Bond's political career and commitment to a radical Republican ideology of "equal access to law" see Richard P. Fuke, "Hugh Lennox Bond and Radical Ideology," Journal of Southern History 45 (November 1978): 569-86.

parents willing to provide for them. Hugh Bond issued writs of habeas corpus to release many of the apprentices and even provided free legal advice to Freedmen's Bureau officials who worked to eradicate this anachronistic system. Bond ran for governor in 1867 on a Republican platform which appealed for black voting rights. Although Bond made clear to the blacks that they must be willing to work to enjoy the fruits of their liberty, he was considered "too severely radical" by most of the state's Republicans. The campaign ended with the Republican Party seriously divided and the Democratic machine in power.<sup>22</sup>

The commitment to black equality which rendered Hugh Bond unacceptable to Maryland voters made him an attractive candidate to President Grant who chose him for the federal judiciary in 1871. Senate confirmation did not follow automatically, however. Radical Republicans supported Bond's nomination, but his racial attitudes made him an unpopular candidate among Democrats and conservative Republicans, particularly those from the border states. Nominated in April, Bond was not confirmed by the Senate until July 18, and then only by a vote of twenty-eight to twenty-one. Soon after his appointment to the Fourth

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<sup>22</sup>W.A. Low, "The Freedmen's Bureau and Civil Rights in Maryland," Journal of Negro History, 37 (July 1952): 232, 241-42; Jean H. Baker, The Politics of Continuity: Maryland Politics from 1858-1870 (Baltimore: Johns Hopkins University Press, 1973) pp. 181-88.

Circuit Court Bond presided over the Ku Klux Klan trials, first in North Carolina and then in South Carolina.<sup>23</sup>

Bond set out full of determination to end the Klan's reign of terror. He did not perceive his role in the South Carolina Klan trials as that of an impartial jurist, but rather as a pivotal member of a federal team determined to pursue successful prosecution. The Klan has "engaged in a war with the U.S. Courts," he wrote his wife. Bond vowed to punish Klan offenders "even if it costs me my life." But the circuit judge's support of Republican Party objectives as he assumed the task of interpreting the substantive constitutional meaning of the enforcement legislation was tempered by his judicial independence and long-standing constitutional scruples.<sup>24</sup> Bond's ability to construe constitutional law was also influenced by his brother on the bench, District Judge Bryan.

George Seabrook Bryan was a Democrat and former slave owner who could be trusted to represent local interests in the two-headed circuit court. Bryan received his appointment to the federal judiciary by virtue of his pre-war political sentiments when he had been an outspoken anti-secessionist. When the first legislature convened in South

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<sup>23</sup>U.S. Congress, Senate, Journal of the Executive Proceedings, vol. 17 (Washington, D.C.: Government Printing Office, 1901), pp. 536-37.

<sup>24</sup>Hugh Bond to Anna Bond, 14 June 1871 and Hugh Bond to Anna Bond, n.d., Hugh Lennox Bond Papers, Maryland Historical Society, Baltimore, Maryland.

Carolina following the Civil War, the state lawmakers recommended Bryan as federal judge. President Andrew Johnson followed their advice; Bryan was confirmed by the Senate and took his seat on the bench in 1866. The civil courts of the United States in South Carolina were reopened for the first time under Judge Bryan. There he sat about to restore constitutional order--Southern style. Bryan stood up to the military commander in Charleston, General Sickles, insisting on open courts and the right of trial by jury rather than martial law, a position which demonstrated courage. When the judge's pronouncements and contempt attachment failed to sway the General's opinion, Bryan appealed to President Johnson as Commander-in-Chief. It was District Judge Bryan, also, who first ruled that Southern lawyers did not have to take the test oath to appear in federal or state courts, a principle which was followed throughout the South. His opinion was later affirmed by the Supreme Court in Ex parte Garland (4 Wallace 333).<sup>25</sup>

Bryan had already presided alone over Enforcement Law cases in the United States District Court (with full powers of a Circuit Court) which met in Greenville in August and September 1871. Upon the insistence of the acting district attorney, Bryan had required the grand and petit jurors to

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<sup>25</sup>U.R. Brooks, South Carolina Bench and Bar (Columbia, S.C.: The State Company, 1908), pp. 336-345; City of Charleston Year Book-1895 (Charleston, S.C.: n.p., 1895), pp. 376-85.

take the required oath under the Ku Klux Klan Act of 1871. The grand jury found true bills against several persons indicted for conspiracy against a citizen for voting and intimidating a citizen because of voting. The prosecution, however, had absolutely no luck at trial in Judge Bryan's court. The juries in each case either returned a verdict of not guilty or ended in mistrial.<sup>26</sup> Clearly Judge Bryan failed to give the firm direction necessary to bring a successful prosecution. Judge Bond recognized that Bryan would be a problem to the enforcement effort. "I am in a peck of trouble with old Bryan," he wrote: "The democrats have got hold of him--visit him in crowds & persuade him to be a stick between our legs at every step." The Democrats were indeed making every effort to influence Judge Bryan's interpretation of the law. Wade Hampton, Confederate military hero, future redeemer governor of South Carolina, and certainly one of the most influential men in the state urged upon Judge Bryan the "vital necessity of his taking his seat upon the bench with Bond." According to Judge Bond, "they have stuffed him full of the idea that the Democrats will make him Gov[ernor] if he differ with me." Bond was equal to the challenge, however. "I went to him [Bryan] the other day & frightened him half to death," he

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<sup>26</sup>Minute Book of the United States Circuit Court, District of South Carolina, January 1869-March 1872, Federal Records Center, East Point, Georgia, (hereafter cited as Minute Book), pp.457-94.

told his wife. "I stormed at him and told him . . . he had better not keep the court sitting doing nothing but posing about the smallest matter in the world day after day."<sup>27</sup>

South Carolina Democrats were as interested in providing a good defense for the "unfortunate people" who had suffered such enormous "trials and wrongs" from the Enforcement Laws as they were in influencing the bench. Wade Hampton rallied support through a subscription campaign to secure the soundest conservative legal talent available to defend the Ku Klux Klan and--more important--question the constitutionality of the Enforcement Acts. Hampton thought that Northern lawyers would "have more weight than our own advocates and could speak more freely." Democrats raised a reported \$10,000 to hire Senator Reverdy Johnson of Maryland and Henry Stanbery of Ohio.<sup>28</sup>

An outspoken critic of Republican reconstruction measures, Democratic Senator Reverdy Johnson was a natural choice for defense counsel. Johnson, like Judge Bond, was a Unionist from Baltimore. He had welcomed the end of slavery, yet his sympathies were aligned with Southern white sentiment. As a minority party member of the Joint

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<sup>27</sup>Hugh Bond to Anna Bond, n.d. [November 1871], 26 November 1871, and n.d. [1871], Hugh Lennox Bond Papers, Maryland Historical Society; Hampton to A. Burt, 22 October 1871, Wade Hampton Papers, Duke University.

<sup>28</sup>Hampton to A. Burt, 22 October 1871, Wade Hampton Papers, Duke University; Charleston Daily Courier, 25 November, 1871.

Committee on Reconstruction, Johnson had recommended immediate restoration of the Union with a general amnesty for all Confederates. Negro suffrage, in his opinion, should have been postponed until the blacks were sufficiently educated to understand the duties of citizenship. For Johnson, the Enforcement Acts exceeded the constitutional authority of the Congress and seriously interfered with the reserved powers of the states. President Grant, he believed, had recklessly suspended habeas corpus in a state where no rebellion existed. He therefore welcomed the opportunity to defend the Carolina nightriders, understanding that the fate of the individual Klan members would be less important to the outcome of the trials than the constitutional questions which would arise.<sup>29</sup>

Johnson was as much at home in the courtroom as he was in the Senate chambers. His counsel was sought on many fine points of constitutional law; it was Reverdy Johnson, for example, who had argued the Southern side of the Dred Scott

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<sup>29</sup>Bernard C. Steiner, Life of Reverdy Johnson (New York: Russell & Russell, 1914; reprint, 1970), pp. 118-135; James Brooks and Reverdy Johnson, "A Correspondence between the Hon. James Brooks of New York and the Hon. Reverdy Johnson of Baltimore on the State of the Country" (Baltimore: Sun Book and Job Office, 1872), pp. 7-15; Reverdy Johnson, "Speeches of Hon. Reverdy Johnson on The Military Reconstruction Bill" (Washington: Congressional Globe Office, 1867), pp. 3-5, 8-9; Reverdy Johnson, "Speech on Grant and the Ku Klux Bill," Charleston Daily Courier, 6 November 1871. "Reverdy Johnson," Dielman-Hayward Files, Maryland Historical Collection.

Case before the Supreme Court. His biographer reported that Johnson commanded the highest legal fees of any lawyer of his day. If he believed in a cause, however, he sometimes donated his services. Judge Bond reported that Johnson came to South Carolina well equipped to take on the federal prosecutors: "He has made every preparation to fight every inch. Has made himself (or has been posted by others) acquainted with the local statutes & practice and knows more about both than Judge Bryan who has been on the bench this six years." Bond not only admired the defense attorney's legal skills, he enjoyed his company. They had rooms close by one another, took their meals together, and Bond read the newspapers to Johnson who was almost blind. "I would like to have the old gentleman with me all the time," Bond told his wife, "but on the other side." If Johnson denied the constitutionality of the Enforcement Acts, he was nonetheless shocked and sickened to learn of the deep depravity of the Klan's activities. His own son, the United States Marshal in South Carolina, filled his father in on the details of the Klan outrages upon his arrival in South Carolina.<sup>30</sup>

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<sup>30</sup>Steiner, Reverdy Johnson, p. 37; Hugh Bond to Anna Bond, 26 November 1871 and 28 November 1871, Hugh Lennox Bond Papers, Maryland Historical Society; "In Memoriam: Reverdy Johnson," Proceedings of the Bench and Bar of the Supreme Court of the United States (Washington: Joseph L. Pearson, 1876).

Henry Stanberry of Ohio was the second defense attorney hired by South Carolina Democrats to handle the Klan's defense. An outspoken critic of federal Reconstruction measures, he opposed all federal encroachment on traditional state power. "Restoration" rather than Reconstruction was Stanberry's policy. A Whig turned Democrat, Stanberry was the first Attorney General of the state of Ohio and was, like Johnson, a former Attorney General of the United States. He had served in Andrew Johnson's Cabinet, then resigned to serve as defense attorney in the President's impeachment trial.<sup>31</sup> Stanberry and Johnson were aided by several other South Carolina attorneys who reportedly donated their time to the defense. The local attorneys attended to the day-to-day defense of the individual Klansmen while the eminent counsel concentrated their efforts on the important constitutional issues. The defense focused on securing a division of opinion between Judge Bond and Judge Bryan which would force the Supreme Court to consider the constitutionality of the Enforcement Acts.

Responsibility for planning and implementing prosecution strategy fell to David T. Corbin, United States Attorney for South Carolina from 1867-1871. Corbin was a

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<sup>31</sup> Biographical Encyclopedia of Ohio of the Nineteenth Century (Cincinnati: Galaxy Publishing Co., 1876), pp. 433-34; Henry Stanberry, Speech at the Great Democratic Banquet in the City of Washington, 8 January, 1868, in An Appeal to the Senate to Modify its Policy, and Save from Africanization and Military Despotism the States of the South (Washington: Democratic Executive Committee, 1868).

prominent South Carolina Republican with the "reputation of being one of the most conservative and fair of the Republican Party." Corbin had graduated from Dartmouth College and established a law practice in Vermont before the Civil War. He served in the Union Army, then came to South Carolina as a member of the Veteran Reserve Corps. As a Freedman's Bureau Agent, Corbin observed first hand the stormy relations between White South Carolinians and the former slaves. An ambitious politician, Corbin also served in the State Senate from 1868 to 1872, as solicitor for the Constitutional Convention of 1868, and commissioner to revise the South Carolina Statutes in 1868-1872.<sup>32</sup>

The United States Attorney labored under tremendous pressure. Corbin had spent weeks in York County hearing testimony and gathering evidence for the trials. To him fell the task of indicting the hundreds of Klan members who had been arrested and surrendered. Preparing indictments was no easy job. Feeling his way in unfamiliar constitutional territory, Corbin sought the advice of Attorney General Akerman and hoped that his superior would be on hand for the trials; both Corbin and Akerman had assisted at the first major Ku Klux Klan trials in Raleigh, North Carolina. Encouraged, perhaps, by federal District Attorney Darius H. Starbuck's successful prosecution of the

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<sup>32</sup>Biographical Directory of South Carolina Senate (Columbia: University of South Carolina Press, 1986), 1: 327-30.

North Carolina Klan, and pressed by the work he had to do in Washington, Akerman declined to attend the opening of the South Carolina trials in November 1871. Even the news that the defense had secured some of the most formidable legal talent in the nation did not convince Akerman that Corbin needed him in court. "Skillful lawyers residing on the spot can generally match men of eminence from a distance," he wrote, "the very fact of sending off for celebrated counsel often striking the jury as evidence of a cause inherently weak."<sup>33</sup>

Akerman did not attend the South Carolina trials, because he trusted Corbin's ability. Still he recognized the enormous pressure on the prosecuting attorney and arranged for him to have the assistance of Daniel H. Chamberlain, Attorney General of South Carolina, and Major Lewis Merrill.<sup>34</sup> It was impossible for Corbin simultaneously to manage the witnesses, supervise the grand jury, and conduct the prosecution. Thus the assistance of Chamberlain and Merrill (who knew more than any other man about the Ku Klux Klan) would prove invaluable to the government's efforts. Akerman also hired a stenographer to record verbatim the Klan trials in Columbia.

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<sup>33</sup>Akerman to D. T. Corbin, 23 November 1871, Instruction Book C, RG 60, NA; Akerman to D. T. Corbin, 6 December 1871, Amos T. Akerman Papers, University of Virginia.

<sup>34</sup>For biographical information on Chamberlain see Chapter 1.

The United States Circuit Court opened in Columbia, South Carolina on November 28, 1871, amid great excitement. Both sides recognized the enormous implications of the constitutional questions which would be argued in the Fourth Circuit Court. "The Constitution of the United States is on trial," the Charleston Daily Courier put it: "In the history of this country no questions more important have ever arisen or been presented to a judicial tribunal for adjudication than are those which will arise in the trials now about to take place." Members of the bar and state judges crowded into the courtroom in the state capital building. Newspaper reporters from around the nation flocked to the city. Black witnesses, both male and female, also traveled to the capital city. Democratic newspapers complained loudly about the "lazy and idle looking negroes who were paid and clothed at government expense" and would be paraded as the "mangled victims of the murderous Klan." According to the newspapers these were "witnesses ready to swear to anything" for the \$2.00 per day they were paid to be in Columbia.<sup>35</sup>

When the Court opened the first order of business was the jury. The clerk called the lists of jurors, black and white, from all over the state. White South Carolinians were slow to answer the summons. Neither grand nor petit

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<sup>35</sup>Charleston Daily Courier, 27 and 29 November 1871, 6 January 1872.

jurors showed up in a number sufficient to conduct the trials, undoubtedly because the Ku Klux Klan Act of 1871 required all jurors on enforcement law cases to swear an oath that they had never participated in the Klan.

Perjuring themselves in court was a risk that few were willing to take.<sup>36</sup>

Corbin rose immediately to challenge the entire array. Corbin's action was no surprise. Judge Bond had written his wife on the 26th that "the jury has been drawn all wrong, I shall have to quash the array & there for [sic] a howl all over the country about packed juries." The judge was correct. Word had leaked out about the proposed challenge to the array. The Charleston Daily Courier speculated that the government attorney planned to get rid of the jurors who had been called in order to make one up of bystanders "who would convict." The paper went on to admit, however, that the jury which had been summoned was likely to be friendly to the prosecution. The names were submitted by Internal Revenue Agents throughout the state--good Republicans all--with every reason to provide names of jurors with similar interests.<sup>37</sup>

Corbin made his challenge because the jury had been drawn irregularly. The law required that the jury be drawn

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<sup>36</sup>Minute Book, pp. 510-12; KKK Reports, 5: 1615-17.

<sup>37</sup>Minute Book, pp. 510-12; KKK Report, 5: 1615-17; Hugh Bond to Anna Bond, 26 November 1871; Charleston Daily Courier, 29 November 1871.

in the presence of the clerk and the marshal, but the clerk had allowed a small child to draw the names from the jury-box when the marshal was not present. Judge Bryan and the bailiff had been in the courtroom when the names were chosen, however. Reverdy Johnson opposed the challenge and wondered what Corbin hoped to accomplish by the delay. Corbin feared that an irregularly chosen jury could be used by the Supreme Court as reason to set aside the venire and order a new trial on any case which might proceed to the High Court. Johnson offered to waive all objections to the matter in which the jury had been chosen, an offer which was accepted the following day when Corbin withdrew his challenge.<sup>38</sup>

There still remained the problem, however, of finding enough people to fill the grand and trial juries. Both sides agreed that a jury made up of the bystanders was unacceptable, that the jury would have to be drawn from the entire district. Exactly what constituted the district was the next problem. Reverdy Johnson argued that the jury must be drawn from the western district, the district in which the Klan had been most active. Clearly the defense hoped to impanel jurors who would be intimidated by the prospect of convicting their neighbors. The prosecution insisted,

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<sup>38</sup> Corbin cited a case, Clair v. the State, in which the Supreme Court ordered a new trial on the grounds that the jury was chosen incorrectly. KKK Report, 5: 1616; Minute Book, pp. 512-13.

however, that the entire state was one district so far as the Circuit Court was concerned. It was divided into eastern and western districts only for District Court purposes. Judge Bond agreed, a decision favorable to the prosecution. He ordered the United States Marshal to summon a jury from the entire state.<sup>39</sup>

The result of the presiding judge's order was a majority of black Republicans who sat on both the grand and petit juries. Many of the whites summoned for jury duty again defaulted. Thus fifteen of the twenty-one member grand jury were black; the foreman, Benjamin K. Jackson was a white Republican. Over two-thirds of the petit jurors who answered the summons were black. Each of the cases tried in this group of trials had a jury with a majority of blacks. "In perhaps no political trial in American history," as Kermit Hall has noted, "have the juries been less representative of the defendants."<sup>40</sup>

The black majorities on the juries increased the animosity toward federal efforts to stop the Klan's activities. Blacks before the Civil War had neither sat on juries nor testified in courts against whites. That they could do so now was still unthinkable to most white South Carolinians. Local attorneys considered it humiliating to

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<sup>39</sup> KKK Reports, 5: 1617-19; Minute Book, pp. 513-15; Hall, "Political Power and Constitutional Legitimacy," pp. 938.

<sup>40</sup> *Ibid.*, p. 938; Minute Book, p. 515-16.

have to address black jurors, and whites considered it beneath their dignity to have to sit on the jury with blacks. Southern newspapers sneered at the juries and labeled the trials a "farce which in now being acted in the United States Court under the name of a trial." Judge Bond wrote, "I fear that we will not be able to control the court, tempers run very high, and the populace is unsettled."<sup>41</sup>

The entire nation turned its attention to South Carolina as the Courtroom drama began. Democrats and Republicans across the country understood that the Ku Klux Klan was not the only thing that was on trial. The meaning and scope of the Reconstruction Amendments and Enforcement Acts was also before the court. Decisions made in South Carolina would carry important implications for the future of four million freedmen. It was up to federal judges to breathe life and meaning into the ambiguous words and phrases of the Fourteenth Amendment and laws of Congress. The prosecution and defense squared off to present their opposing Constitutional views. The black citizens of South Carolina, meanwhile, looked to Judge Bond for protection.

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<sup>41</sup>Charleston Daily Courier, 19 December 1871; Hugh Bond to Anna Bond, 14 April 1872, Hugh Lennox Bond Papers, Maryland Historical Society, Baltimore, Maryland. On the attitude of white Southerners toward blacks in the courts, see for example, Eli H. Baxter to A.B. Springs, 14 May 1867, Springs Family Papers, and Edward Lipscomb to Smith and Sally Lipscomb, 30 June 1869, Lipscomb Family Papers, both in Southern Historical Collection, University of North Carolina, Chapel Hill.

## CHAPTER 4 THE CONSTITUTION AND THE KLAN ON TRIAL

The great South Carolina Ku Klux Klan trials provided a unique opportunity to explore the meaning of Republican Reconstruction measures. The adversarial nature of the courtroom made the Fourth Circuit Court a forum for constitutional interpretation as prosecution and defense attorneys struggled to define the meaning of the vague phrases of the Fourteenth and Fifteenth Amendments, the Enforcement Act of 1870, and the Ku Klux Klan Act of 1871. Both sides recognized that the decisions rendered by the judges on the constitutional issues were more important than the fate at trial of the individual Klansmen.

The goal of the prosecution was not only to gain convictions, a relatively simple matter under the conspiracy provisions of the Enforcement Acts, but to establish a broad nationalization of black civil and political rights. The United States attorneys framed long indictments with counts designed to extend the meaning of the Reconstruction Amendments, stretch the limits of the state action concept, and incorporate the Second and Fourth Amendments through the Fourteenth in order to secure for blacks the right to bear arms and to be safe in their homes from illegal search and

seizure. These fundamental freedoms were essential if blacks were to maintain their political rights.

Incorporation also offered the best hope of extending federal protection to black women who were often the victims of Klan atrocities but totally unprotected by the conspiracy provisions of the Enforcement Acts which were designed to protect political rights, rights which women did not enjoy. The prosecution needed to gain strong precedents at the trial level if the federal government was to secure black citizens in their civil and political rights, but the nationalistic goals of the federal attorneys were not the only ideas represented during the trials.<sup>1</sup>

The defense attorneys spoke for the multitude of Americans, North and South, who desired a quick return to traditional federal-state relations. Henry Stanbery and Reverdy Johnson pressed for a conservative, states' rights interpretation of the constitutional questions, while making clear that they abhorred the violence committed by their clients. The South Carolina Klan trials delineated the

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<sup>1</sup>The KKK Reports for South Carolina contain a verbatim record of the first group of Klan trials in November, 1871-January 1872, see KKK Reports, 5: 1615-1990. The complete trial record is also in Proceedings in the Ku Klux Trials at Columbia, S.C. in The United States Circuit Court, November Term, 1871, (n.p.: Republican Printing Company, 1872; reprint ed. New York: Negro Universities Press, 1969) (hereafter cited as Proceedings). The Minute Book of the U.S. Circuit Court of the District of South Carolina, January 1869-March 1872, the Sessions Index, and 174 Case Files have also survived. These materials can be located at the Federal Records Center in East Point, Georgia.

constitutional conflicts within a nation deeply divided over its responsibilities to four million freedmen and its authority to protect them in the rights of citizenship. The fate of the hundreds of individual Klansmen awaiting trial was almost incidental to the larger issues to be considered in federal court in South Carolina. The defense attorneys, as Henry Stanbery put it, "came to the conclusion that the two laws of 1870 and 1871, under which these proceedings in your State had been going on for some time, were unconstitutional." Thus they undertook the defense of the Carolina nightriders for the express purpose of securing a division of opinion between the two judges which would send a case to the Supreme Court.<sup>2</sup>

The first case to come to trial was U.S. v. Allen Crosby. It involved a large Klan raid on the home of Amzi Rainey, a "most respectable mulatto" who had "always maintained an excellent character." Rainey's only offense was that he supported the Republican Party. Klansmen broke into Rainey's home at night, fired on Rainey and other family members, beat his wife senseless with a young child in her arms, raped one daughter, then shot another in the head. The nightriders then dragged Rainey from the house, beat him and planned to kill him. They had a change of heart, however, and allowed Rainey to run for his life after he promised never again to vote the Radical ticket. The

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<sup>2</sup>Proceedings, p. 420.

Klan continued its rampage throughout the night, whipping other blacks as well.<sup>3</sup>

District Attorney Corbin framed a long indictment designed to secure an expansion of black rights under the Fourteenth and Fifteenth Amendments and the Enforcement Acts. Corbin's commitment to black rights emerges clearly from his letters to Attorney General Akerman. Corbin studied the Constitution and Enforcement Acts carefully for himself, wrestling with the problem of intent. He recognized the novelty of "setting up Constitutional rights in an indictment," but concluded that the purpose of the recent Amendments to the Constitution was to secure positive civil and political rights for black citizens and to protect them in those rights, from both state action and individual discrimination: "The more I study it the more I am convinced that the citizens of the Country generally may appeal to it under the legislation of Congress, and many a poor man in the South will rejoice that it is so." Corbin recognized, however, that his expansive view of the Fourteenth and Fifteenth Amendments was not universal, that many people believed the Constitution operated on the people only as they were represented by their state governments.

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<sup>3</sup>Corbin to A.T. Akerman, 3 December 1871, S.C.F., S.C.; KKK Report 3: 1637.

He was "satisfied," however, "that this ought not, and never was intended to be its full scope."<sup>4</sup>

Corbin's nationalistic view of the Reconstruction Amendments was shared by other federal attorneys in the South. This theory held that the Fourteenth and Fifteenth Amendments, although stated negatively, conferred positive rights. Corbin also believed that the Fourteenth Amendment nationalized the Bill of Rights. If a state did not protect its citizens, the federal government could place itself squarely between the citizen and the state.<sup>5</sup> Corbin recognized that charging a conspiracy to deny the right to vote under the First Enforcement Act was inadequate to protect black citizens from Klan brutality. While the Klan was primarily political in its purposes, and the typical outrage consisted of breaking into a black Republican's home, stealing or destroying his gun, dragging him outside and whipping him unmercifully, then warning him never again to vote the Republican ticket, many of the Klan's most brutal atrocities were crimes against women and children who could not vote.

Corbin sought a method by which he could bring the women and children under the protection of the federal

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<sup>4</sup>Corbin to A.T. Akerman, 17 November 1871, S.C.F., S.C.

<sup>5</sup>Ibid.; Corbin to Akerman, 13 November 1871, S.C.F., S.C. For the constitutional theories of federal attorneys elsewhere in the South see Kaczorowski, Politics of Judicial Interpretation, *passim*.

government. He had already experimented with the problem of protecting women during the August 1871 term of the Western District Court of South Carolina. He had charged several persons with "going in disguise for the purpose of depriving one Harriet Martin of the equal privileges and immunities under the laws, to wit, the privileges and immunities of life, liberty, and property." The grand jury found a true bill, but the case was never tried. The indictment indicated, nonetheless, that Corbin was searching for a way to protect female victims of the Klan. He continued that process during the November 1871 circuit court. He framed an indictment which charged several Ku Klux Klansmen with committing an assault and battery on Lucretia Adams and Phoebe Smith in the act of "hindering, preventing, and restraining" some black males from exercising their right to vote. Attaching the assault and battery charge to the charge of interfering with Fifteenth Amendment rights demonstrated the difficulty of extending the federal law to women. The Klan outraged the two women at the request of Adams' husband, who was apparently a favorite of the whites. When the wife left her husband for "keeping another woman," the husband beat her himself, then sent the Klan to whip both the wife and her aunt to punctuate his demand that she come home. This crime clearly had nothing to do with voting rights, but Corbin could not charge an ordinary assault and

battery in federal court unless it was connected with a federal violation.<sup>6</sup>

Corbin's best hope for securing the rights of all citizens from the Klan's outrages lay in his assumption that the Fourteenth Amendment nationalized the Bill of Rights. Because many of the Klan's outrages included breaking into the homes of black and white Republicans in order to take their guns, Corbin planned his strategy to secure for these South Carolina citizens the Fourth Amendment right to be free from illegal search and seizure and the Second Amendment right to keep and bear arms. If he could establish these constitutional rights in federal court, then the United States would have the means to protect all citizens, male and female, black and white.<sup>7</sup>

Corbin consulted with Akerman before the November trials began, seeking his advice on the question of securing these Bill of Rights guarantees in an indictment. The Attorney General had already given the problem some thought. Since the whole field of civil rights enforcement was so new, he had written a United States Attorney in Mississippi, it was impossible to determine without some experimentation exactly "what should be the theory of the prosecution," or exactly how indictments should be framed. Akerman advised a

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<sup>6</sup>Criminal Case Records, S.C., roll number 105 and 1131:  
KKK Reports 5: 1577-78.

<sup>7</sup>Corbin to A.T. Akerman, 13 November 1871, S.C.F., S.C.

variety of different forms and charges to "see how they will stand the scrutiny of a trial" and "where the dangers are." Akerman did not question Corbin's assumption--voiced in the indictments he prepared for the Klan trials--that the Fourteenth Amendment incorporated the Bill of Rights. He shared the federal attorney's expansive view of federal power. "Upon the right to bear arms," he wrote Corbin, "I think you are impregnable." He doubted, however, that a Fourth Amendment charge would stand. He thought the protection from unreasonable search and seizure referred to were those which were made "under color of official authority" rather than those which were "irregular and unofficial." He was not certain that his interpretation was correct, however, and he encouraged Corbin to "make the point."<sup>8</sup>

Corbin made his points in an eleven count indictment which promoted a nationalistic construction of the Fourteenth and Fifteenth Amendments and the Enforcement Acts. Two of the counts, the first and eleventh, were similar to those with which U.S. Attorney D.H. Starbuck had already won convictions under Judge Bond in the first major Ku Klux Klan trials in Raleigh, North Carolina, where both

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<sup>8</sup>Corbin to A.T. Akerman, 13 November 1871, S.C.F., S.C.; Akerman to John A. Minnis, 16 August 1871, Instruction Book B-1, RG 60, NA; Akerman to D.T. Corbin, 16 November 1871, Instruction Book C, RG 60, NA.

Corbin and Attorney General Akerman had assisted.<sup>9</sup> The first count charged a general conspiracy to violate the first section of the Enforcement Act of 1870 by interfering with black voters. The eleventh charged numerous Klansmen with conspiring specifically against Amzi Rainey on April 21, 1871, for having supported the election of Republican Congressman A.S. Wallace. The date is significant; Corbin drew the eleventh count on the Ku Klux Klan Act of April 20, 1871, even though the outrage occurred in March 1871. Corbin initially planned to rest his entire case on the 1870 Act, as he wrote Akerman, but changed his mind and included the Ku Klux Klan Act to make the point that the conspiracy continued after the passage of the Ku Klux Klan Act.<sup>10</sup> Two other counts, the ninth and tenth, also depended on the 1871 Act. They charged a conspiracy to deprive Rainey of equal protection of the laws and equal privileges and immunities.

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<sup>9</sup>The North Carolina indictments contained three counts which charged the defendants with conspiring to beat a specific black citizen to prevent his voting in the future, for having voted at a past election, and for conspiring by intimidation and force to violate the first section of the Enforcement Act of May 31, 1871. Minute Docket of Criminal Proceedings, U.S. Circuit Court, Eastern District of North Carolina, 1867-1878, p. 230; Circuit Criminal Case Files, 1866-1892, Eastern District of North Carolina, Case number 106, U.S. v. Randolph Shotwell, Federal Records Center, East Point, GA. Another indictment which was not actually used in a trial contained considerable experimentation on constitutional issues. See Case File number 106.

<sup>10</sup>Criminal Case Records, S.C., roll number 172, Federal Records Center, East Point, GA. Indictment is reprinted in Proceedings, pp. 825-32, 121; Corbin to Akerman, 13 November 1871, S.C.F., S.C. See also Hall, "Political Power and Constitutional Legitimacy," pp. 929-30.

These counts demonstrated the difficulty of establishing constitutional rights in an indictment; they were so general as to be virtually meaningless. It was impossible, as Judge Bond stated, to judge what crime had been committed or which privilege violated.<sup>11</sup>

The second through seventh counts evinced Corbin's understanding that the Fifteenth Amendment conferred a positive right to vote. Each charged some offense against the "right and privilege . . . of suffrage." Ordinary crimes, like burglary, assault, and breaking and entering, were attached to these charges. Here Corbin was testing the controversial section seven of the 1870 law which stated that if an ordinary crime was committed in the act of violating the Enforcement Act, the offender could be punished in the same manner as if he were convicted for the crime in a state court. Corbin apparently entertained some doubts about the efficacy of this manner of determining punishment for the guilty, but he determined to fight out these "exceedingly embarrassing" questions in court if necessary. He later complained that the method had caused him great inconvenience.<sup>12</sup>

The eighth count charged a conspiracy to deny the Fourth Amendment right to be secure against unreasonable

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<sup>11</sup> KKK Reports, 3: 1645; Proceedings, pp. 831-32.

<sup>12</sup> Ibid., pp. 65, 826-31; U.S. Statutes at Large, 16: 141; Corbin to Akerman, 13 November 1871, S.C.F., S.C.

search and seizure. Here Corbin was asserting his notion that the Fourteenth Amendment incorporated the Bill of Rights and that the federal government could protect individuals in their rights when the state failed to act in their behalf. Thus he stretched the state action concept in the Amendment to include state inaction.<sup>13</sup>

Taken as a whole, the indictment promoted an enlarged sphere of authority for the federal government and a broad nationalization of black civil and political rights. The Fourth Amendment count--if it stood--would afford federal protection for women and children. The expansive version of federal authority promoted in this indictment would not only enhance black rights and protect women and children, it would also secure the future of the Republican Party in the South. Corbin recognized that the defense would launch a furious attack on the constitutional rights he had attempted to set up in his indictment, but confidently labeled it "an amusement I trust we shall live through."<sup>14</sup> The government attorney expected the full support of Republican Circuit Judge Hugh Bond who had already overruled a motion to quash an indictment against the Ku Klux Klan in North Carolina.

Stanberry and Johnson did indeed attack furiously, moving to quash the entire eleven count indictment. The arguments on the pretrial motion took three entire days.

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<sup>13</sup>Proceedings, p. 831.

<sup>14</sup>Corbin to Akerman, 3 December 1871, S.C.F., S.C.

The defense's most important arguments countered the broad interpretation of the Enforcement Acts and Reconstruction Amendments which informed the indictment. They argued, predictably, for a narrow states' rights interpretation of federal authority. Stanbery insisted first that the Fifteenth Amendment did not confer a positive right to vote; it merely limited the states' authority in regulating the suffrage for federal elections. In state and local elections, according to Stanbery, the Amendment offered no protection whatsoever. Thus the counts which described voting as a right granted by the Constitution were all invalid.<sup>15</sup>

Stanbery declared the Fourth Amendment charge objectionable, because the Bill of Rights was a restriction against federal authority. The defense refused to recognize any alteration which the Fourteenth Amendment had made in "well-established doctrine" regarding federal-state relations; only the states were competent to protect individual rights. "Great God," Stanbery asked, "Have we forgotten altogether that we are citizens of States and that we have States to protect us?" He vowed to "fight to the last ditch, against Federal usurpation" of those "personal, sacred immunities that attach to us as individuals, and are protected by the domestic law."<sup>16</sup> In more technical, legal

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<sup>15</sup> Proceedings, pp. 16-33, 68-78.

<sup>16</sup> Ibid., pp. 30-31.

terms, Stanbery objected to the language of the indictment and its lack of specificity. He attempted to show that it should have been made on a section of the Enforcement Act which would have made the crimes misdemeanors rather than felonies. And in an argument which was absurd, Stanbery claimed that a conspiracy against the rights of voters could only be effected on election day.<sup>17</sup>

Reverdy Johnson reiterated Stanbery's narrow interpretation of national powers under the Reconstruction Amendments. The Thirteenth, he argued, "does nothing but abolish slavery." In no way did it allow Congress the right to regulate suffrage.<sup>18</sup> The Fourteenth Amendment, according to Johnson, granted citizenship to the freedmen, but it, too, stopped short of conferring on the national government the right to interfere with the suffrage. The proof was in the fourth section, a "persuasive measure" which provided for a reduction in Congressional representation if the state made restrictions on the grounds of race or color. Even the Fifteenth Amendment, Johnson maintained, did not "clothe the Congress of the United States with the whole authority to

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<sup>17</sup>Ibid., and pp. 79-83. Stanbery's argument was absurd because the primary thrust of most of the Klan raids had been to convince Republicans, both black and white, that they must no longer vote the Radical ticket.

<sup>18</sup>Johnson stated that the Thirteenth Amendment gave the former slaves "every right . . . belonging to a freeman," but he failed to address the problem of what rights accompany freedom. Proceedings, p. 71. On this point see also Kaczorowski, Politics of Judicial Interpretation, pp. 124-25.

regulate" the suffrage. It merely restricted the states in their power to interfere with existing rights. If the Fifteenth Amendment had "clearly and unambiguously" taken from the states "the right to regulate the suffrage," Johnson insisted, "it never would have been adopted by the people of the United States." Since the recent amendments to the Constitution did not allow national regulation of the voting laws, he continued, the Enforcement Acts clearly lacked constitutional authority. To the extent, therefore, that the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871 assumed that the Fourteenth and Fifteenth Amendments grant a positive right of suffrage their "provisions are void."<sup>19</sup>

The defense launched some of its most strenuous objections against the charges which included the common law crime of burglary. Charging burglary in federal court, according to the defense, was an unwarranted usurpation of state authority; the federal government had no jurisdiction to try such cases. Johnson maintained "with great confidence, that Congress had no power whatever to pass that seventh section."<sup>20</sup>

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<sup>19</sup> Proceedings, pp. 73-77.

<sup>20</sup> Ibid., pp. 79-83. The defense attorneys, throughout the trials, insisted that the government was attempting to try the defendants for ordinary crimes. The common law crimes were included in the indictments, under the provisions of the Enforcement Act of 1870, as a measure of punishment for the Klan conspiracy against the political rights of the victims.

All these questions, Johnson concluded, were serious matters of constitutional interpretation involving the relative powers of the federal government, the states, and their respective judiciaries. He urged upon the judges a traditional evaluation of dual federalism: "May our political planets be suffered also to revolve in their respective orbits, and may God, in His mercy, so guide and instruct them as not to subject them also to the peril of a collision, which may involve all in ruin. . . ."<sup>21</sup> The defense had raised important questions for the bench to consider. If the judges agreed with the defense attorneys in their interpretation, the entire enforcement effort of the government was in jeopardy. No Southern Republican could rest in the knowledge that the federal government would be able to protect him. And the Republican Party in the South was certain to be short-lived.

Daniel Chamberlain, Attorney general of South Carolina and special assistant prosecutor, countered the defense arguments with support for the government's policy. He conceded that the Fifteenth Amendment did not grant an absolute right of suffrage. Practically speaking, however, it did secure citizens of African descent in the suffrage; the defense's objections were "too nice." Chamberlain agreed with defense counsel that personal rights were generally guaranteed to citizens by state laws. He

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<sup>21</sup>Ibid., pp. 83-88.

insisted, however, that Congress had the right to protect citizens in those rights if the states failed to do so. Since large numbers of citizens in the South were not secure from unreasonable search and seizure, the Congress had exercised its power to protect the people. Chamberlain explained, however, that the government did not charge burglary or other ordinary crimes as separate offenses. Nor did the prosecution claim jurisdiction over such crimes. Rather, the prosecution, under the authority of the seventh section of the Enforcement Act of 1870, had attached these ordinary crimes to the federal crime of conspiracy in order to determine the appropriate measure of punishment.

Chamberlain reminded the Court that a conspiracy is complete the moment two or more persons plan to do some unlawful act, whether the act was ever accomplished or not. Thus, he argued, many of the details Stanbery had insisted should be included in the indictment were "surplusage." The charges were sufficient, moreover, because they followed the language of the statute.<sup>22</sup>

District Attorney Corbin made the final arguments for the government on the motion to quash. Like Chamberlain, Corbin insisted that the federal government was not attempting to try ordinary crimes. Charging a burglary committed in the act of carrying out a conspiracy against the rights of voters was "simply a measure of punishment--

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<sup>22</sup>Ibid., pp. 34-58.

nothing more, nothing less." Corbin admitted that he personally did not like the method Congress had chosen, of alleging ordinary crimes committed against state law in connection with offenses tried in federal court: "I do not like the policy of the Act. I do not like the method. It has given me an exceedingly great amount of annoyance; but still it is there, and I am here to enforce the policy of the law."<sup>23</sup> Corbin's doubts echoed those he had already expressed to Akerman on the subject.

Corbin held stronger convictions on the Bill of Rights charge. Making a direct case for the incorporation of the Fourth Amendment through the Fourteenth, Corbin recognized that the Bill of Rights was originally intended as a restriction on the United States. Now, however, the danger was that the states would "encroach upon the rights of the newly enfranchised citizens." The Fourteenth Amendment secured individual rights against the state governments and empowered Congress to pass appropriate legislation to enforce those rights. Rather than attempting to punish the state, Congress chose a method which would punish individuals who conspired to violate the rights of citizens. If Congress deemed this method appropriate, Corbin argued,

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<sup>23</sup>Ibid., pp. 58-67. Although the verbatim trial record is printed in both the KKK Report, Vol.5 and the Proceedings, Corbin's arguments on the Motion to Quash are not included in the KKK Reports.

then it was appropriate. Corbin's remarks both adhered to and stretched the limits of the state action concept.<sup>24</sup>

Corbin's rejoinders were more conservative than the policy he had set out in the indictment and the ideas he had expressed in his letters to Akerman. The indictment conveyed a bold, forthright nationalistic strategy. Now Corbin combined these ideas with a more conservative reading of the Reconstruction Amendments, a policy which is puzzling in light of his desire to enhance civil rights for blacks. He maintained that the Fourteenth Amendment incorporated the Bill of Rights, but bound himself by the state action concept rather than arguing forcefully that the federal government could act directly on individuals who violated the rights of citizens. He waffled similarly on the Fifteenth Amendment, admitting that it secured the right to vote only "in some particulars." He insisted nonetheless that the Amendment secured blacks in the suffrage sufficiently to state it as a right in the indictment. Corbin may have been influenced by the reasoning of such expert counsel as Reverdy Johnson and Henry Stanbery. He complained of the vagueness of the Ku Klux Klan Act and the difficulty of charging offenses under it; he regretted "exceedingly that Congress should use these indefinite

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<sup>24</sup>Ibid., pp. 61-66.

terms, and leave the Court, the attorney, and the people to grope around to find out what they mean."<sup>25</sup>

Corbin's exasperation demonstrated the enormous pressure under which the government attorney had labored, the hundreds of indictments he had written--all of which were now under attack--and the seemingly interminable legal haggling. Corbin personally thought that the Fourteenth Amendment and Enforcement laws secured the citizen "in all the rights which the Constitution grants and secures to a citizen against any combination of persons that undertakes to deprive me of those rights." But he closed his remarks with an appeal to the Court for an interpretation.<sup>26</sup>

The opinion of the Court on the pretrial motion effectively curbed all the broader aims of the government attorneys before the first Klansman was ever tried. Judge Bond wrote and delivered the opinion, but the two-headed structure of the Circuit Court required him to consider the ideas of District Judge Bryan if any of the nightriders were to be brought to justice. Recognizing the political differences between the two judges, Stanberry and Johnson had focused their strategy toward dividing the Court in order to send the case to the Supreme Court.<sup>27</sup> Bond was determined

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<sup>25</sup>Ibid., pp. 61-66.

<sup>26</sup>Ibid., pp. 63-67.

<sup>27</sup>The defense attorneys had come to South Carolina primarily to test the meaning of the Reconstruction Amendments and the Enforcement Acts. Since there was no

to punish the Klan, but his commitment to justice was tempered by an honest concern that the indictment exceeded constitutional authority.<sup>28</sup>

Bond upheld the first count, a ruling which enabled federal attorneys to convict a Klansman by proving conspiracy and demonstrating that the defendant belonged to the organization. He rejected Stanbery's argument that such a conspiracy could operate only on election day. Voters could be intimidated, Bond observed, long before the election actually took place. Neither did he accept the idea that the law applied only to federal elections. Bond adhered to the position that conspiracy did not depend upon any overt act, but was complete the moment the conspirators made their initial compact. The judge's rulings both endorsed the state action theory of federal power--the idea that the national government could legislate only against state action that denied civil rights--and strained to make it fit the situation in South Carolina. Clearly he

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regular means of appeal in federal criminal cases, the defense hoped to secure a division of opinion between the two judges which would certify the case to the Supreme Court. A certificate of a division of opinion was one of only two ways in which a criminal case could proceed to the nation's highest court. The other was on a writ of habeas corpus. Proceedings, pp. 794-6.

<sup>28</sup>For an analysis of Judge Bond's constitutional scruples on civil rights enforcement see Hall and Williams, "Constitutional Tradition Amid Social Change," pp. 43-58. For a conflicting opinion see Kaczorowski, Politics of Judicial Interpretation, pp. 127-29.

understood that a discriminatory state voting statute was not the problem:

Congress may have found it difficult to punish a state which by law made such distinction, and may have thought that legislation most likely to secure the end in view, which punished the individual citizen who acted by virtue of a State law, or upon his individual responsibility [emphasis added].<sup>29</sup>

Bond was willing to go to the outside limit of the state action theory, but not one step beyond. Thus he decided that the federal government could stand in the place of a state when that state refused to protect a citizen's constitutional rights. Bond did not personally appraise the law's constitutionality; rather he deemed Congress the "sole judge of its appropriateness."<sup>30</sup>

The bench divided on the burglary charge. Given Judge Bryan's states' rights philosophy, it is evident that Judge Bond was willing to try the defendants for ordinary crimes committed as a part of the Ku Klux conspiracy. This assumption fits Bond's decision to let Congress determine the appropriateness of punishing individuals. It also demonstrates his desire to convict Klansmen. However, it does not square with the conservatism Bond demonstrated in interpreting the Fourteenth and Fifteenth Amendments. Since the case which was actually certified to the Supreme Court involved murder rather than burglary, it is possible that

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<sup>29</sup>Ibid., p. 90.

<sup>30</sup>Proceedings, p. 91.

Bond divided because of an inclination to test the law rather than from the conviction that the federal government should punish ordinary crimes. During the North Carolina Klan trials Bond had written his wife that "whether this case ought to be tried in the U. S. Courts or the State tribunals is a legitimate matter for arguments."<sup>31</sup> This evidence suggests that Bond doubted the federal government's authority to supersede the state's traditional role in the administration of criminal justice.

Bond insisted that the states retained responsibility for protecting and defining civil rights. Therefore, he quashed the second count of the indictment which declared the vote to be a right granted by the Constitution. The Fifteenth Amendment did not grant suffrage, Bond noted; that power was reserved to the states. The purpose of the Fifteenth Amendment was to prevent voter restriction based on race. He was equally cool to the Bill of Rights charge. Bond insisted that the right to be secure from unreasonable search and seizure preexisted the Constitution as a part of common law. The Fourth Amendment did not confer a right, but acted as a restriction on the United States.<sup>32</sup> Clearly the Judge rejected the notion that the Fourteenth Amendment

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<sup>31</sup>Bond indicated, however, that someone should take responsibility for hanging the Klansmen who had perpetrated the crime. Hugh Bond to Anna Bond, n.d., Bond Papers, Maryland Historical Society.

<sup>32</sup>Proceedings, pp. 91-92.

incorporated the entire Bill of Rights. Curiously, Bond failed even to mention the Fourteenth Amendment in his decision.

Judge Bond's estimation of the Fourteenth and Fifteenth Amendments in his decision was consistent with strict construction constitutional theory. In his opinion, Congress framed the Reconstruction Amendments in a narrow, negative fashion in order to disturb traditional federal-state relationships as little as possible. The Amendments, in this view, limited the ability of the states to pass discriminatory laws or to execute laws unequally, but they did not directly confer additional powers on the national government.<sup>33</sup> Federal interference was limited to cases of state action, or perhaps inaction as discussed above. Paradoxically then, Bond's constitutional views paralleled those of conservatives and Democrats, while his commitment to black rights equaled that of the most radical Republicans.

Despite his conservatism, Bond found the means to reach the Ku Klux Klan in the federal courts. In addition to the first count of general conspiracy, he upheld the eleventh count which charged a conspiracy to injure Rainey for voting in a congressional election. According to Bond, Congress

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<sup>33</sup>See Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," Journal of American History 61 (June 1974): 76-77.

possessed the power to protect voters at federal elections even before the reconstruction amendments and federal laws were passed: "It is a power necessary to the existence of Congress."<sup>34</sup> Although the preliminary legal arguments lasted over a week, the decision Bond made in the first case simplified the indictment process for the following trials so that the federal attorneys could attend to the prosecution.

The Crosby case, despite the long pretrial arguments, was never tried. The defense exchanged guilty pleas on the two counts the judges left standing for a division of opinion on another case, U.S. v. Avery, which was then certified to the Supreme Court. Stanberry and Johnson wanted the Supreme Court to rule on the constitutionally novel issue of determining in federal court whether ordinary crimes had been committed in the process of denying civil rights. The Avery case was selected because it involved a murder and therefore presented the possibility that a person could be sentenced to death for a civil rights violation.<sup>35</sup>

In the first case to be tried, District Attorney Corbin, sorely disappointed by the opinion of the Republican Judge on whom he had counted to uphold his efforts in behalf of black rights, attempted a second time to convince Bond

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<sup>34</sup>Proceedings, p. 92.

<sup>35</sup>Ibid., pp. 109-112. Hall, "Political Power and Constitutional Legitimacy," p. 946. U.S. v. Avery, 13 Wall 251 (1871).

that the Fourteenth Amendment had altered the traditional relationship between the federal government and the states. Corbin argued specifically that the Fourteenth Amendment guaranteed the Second Amendment right to keep and bear arms; the Fourteenth Amendment, he said, "lays the same restrictions upon the States that before lay upon the Congress of the United States." Following Judge Bond's line of reasoning on the Fourth Amendment charge, Corbin emphasized that the right to bear arms did not exist under the common law but was guaranteed by the United States Constitution for the first time in history. Thus the Second Amendment, according to Corbin, was definitely one of the privileges and immunities which the Fourteenth Amendment secured to the citizens against the state. Since many of the Klan's outrages had focused on taking the guns which had been issued to black militia members, Corbin considered the Second Amendment right vital to the prosecution. "We will never abandon it," he insisted, "until we are obliged to." Without their weapons, these men had no way to protect themselves, their homes, or their families from the marauding nightriders. Acceptance of the charge would enable government attorneys to bring black families under

the protection of the federal government.<sup>36</sup> Again, however, Corbin's efforts were frustrated.

Although the District Attorney pressed him hard, Judge Bond refused several times to address the Second Amendment issue. Eventually, however, the judges divided on the question. It is difficult to determine whether Bond changed his mind upon reflection or endorsed the idea that the Fourteenth Amendment incorporated at least some part of the Bill of Rights. Bond was not generally disinclined to state his opinions. If he had accepted partial incorporation, he probably would have given his reasons. It therefore seems likely that he rejected the entire notion of incorporation, divided in order for the Supreme Court to consider the problem, and failed to write a decision on the matter to avoid the appearance of intellectual inconsistency. Thwarted by the judge's silence, the government attorney eliminated the charge from the cases which were actually tried during this session of the Circuit Court.<sup>37</sup>

The prosecuting attorneys in seven days of pretrial arguments saw their major aims defeated before the first Ku Klux Klan trial ever began. The conspiracy charges accepted

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<sup>36</sup>Proceedings, pp. 146-54. On the meaning of the Second Amendment see Robert E. Shalhope, "The Ideological Origins of the Second Amendment," Journal of American History, 69 (Dec. 1982): 599-614; Shalhope, "The Right to Keep and Bear Arms: A View from the Past," Reviews in American History, (Sept. 1985): 347-52.

<sup>37</sup>KKK Reports, 3: 1657, 1670. On partial incorporation see Graham, Everyman's Constitution, pp.313-15.

by the Court would enable Corbin and Chamberlain to prosecute successfully in case after case, but the defense had already attained its goals on the most important constitutional issues involved in the cases. The actual trials, in this sense, were epilogue. But the government attorneys used the trials wisely, not only to bring criminals to justice but also to make the extent and nature of the South Carolina Ku Klux Klan a matter of public record.

Attorney General Akerman shaped the prosecution's strategy in deciding which Klansmen to try. Prosecuting all the individual nightriders would have overwhelmed the existing federal judicial system for many years. Thus Akerman instructed Corbin confidentially to classify the Klansmen into three groups according to their moral guilt, social influence, and intelligence. Offenders of "deep criminality" and those community leaders who should have used their influence to stop the Klan's outrages rather than encouraging them were to be tried first. Unfortunately, however, many of the more influential and affluent leaders had fled when the government suspended habeas corpus. Still the prosecution focused as much as possible on trying Klan leaders and those who perpetrated some of the more heinous crimes. The second group whose "criminality was inferior" to the first class were released on light bail with the instruction that "their cases need not be pressed to a

speedy trial" unless they so desired. The third group consisted of the reluctant nightriders, those who were coerced to join and took little or no part in the violence. Many of this group confessed voluntarily and appeared as witnesses for the prosecution. Akerman advised that they need never be prosecuted if "they bear themselves as good citizens henceforth." Corbin followed the Attorney General's instructions, hoping that implicating community leaders would break the Klan permanently.<sup>38</sup>

The initial pretrial proceedings simplified the indictment and trial process for the trials which followed. In the remainder of the 1871 Ku Klux Klan trials, the government relied on the conspiracy charges left standing by Judge Bond's opinion on the motion to quash. Robert Hayes Mitchell, the first Klansman to come to trial, was indicted on two counts of conspiracy under the First Enforcement Act of May 1870: a general conspiracy under section one unlawfully to hinder or restrain citizens from voting at future elections on account of race, color, or previous condition, and a conspiracy under section six specifically to injure and oppress James Williams for having previously exercised the right to vote.<sup>39</sup>

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<sup>38</sup>Akerman to Corbin, 10 November 1871, Instruction Book C, RG 60, NA; Corbin to Akerman, 13 November 1871, 17 November 1871, S.C.F., S.C.

<sup>39</sup>Proceedings, pp. 449-51.

Williams, also known as Jim Rainey, was a captain of the black militia in York County. He had served in General Sherman's forces and had been instrumental in training the militia. Williams had been outspoken in his determination to protect his race and Party. Reluctant to return the arms which had been issued to his men when Governor Scott disarmed the militia, he had insisted that the freedmen first have guarantees that black citizens would be safe. Rumor got out that he had made threats to "kill from the cradle to the grave." Witnesses for the prosecution, however, insisted that he was a peaceable, law-abiding citizen. None of these witnesses had heard about any threats until after Williams was murdered by the Ku Klux Klan. They maintained, in fact, that "Jim Williams said he was opposed to anything like retaliation" even though the Klan was committing outrages against members of the Republican Party. Defense witnesses, however, insisted that Williams had endangered the entire white community. Doubtless Williams' greatest offense was that he was, as District Attorney Corbin put it, "a pretty independent negro" who "stood up for his rights" and was considered, "consequently, a pretty bad boy." Abhorring the Klan's secret, nighttime oppression of the black community, Williams had, according to one witness, suggested that the

"way to decide between the blacks and the whites is to go into the old field and fight it out" like men.<sup>40</sup>

Leaders of the Ku Klux Klan had decided to silence this outspoken proponent of black rights. Approximately seventy Klansmen in disguise, under the leadership of Dr. James Rufus Bratton, a prominent citizen of York County, assembled on the night of March 6, 1871. The nightriders made several calls on their way to Williams' home, delivering whippings at every stop. A smaller party of about a dozen, personally led by the doctor, abducted Williams from his home, took him to a pine thicket, and hung him from a tree. On his chest the Klansmen pinned a sign which read "Jim Williams on his big muster." The brothers of the Ku Klux Klan then returned to the plantation yard of John S. Bratton, where their host provided food and plenty of whiskey. Defendant Robert Hayes Mitchell was one of the nightriders who participated in the raid on Jim Williams, although he had remained with the horses while the murder took place.<sup>41</sup>

Because all members of the Klan were technically guilty for any of the offenses carried out by the conspiracy, all the prosecution had to do in order to convict Mitchell on

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<sup>40</sup> See for example, Proceedings, pp. 339, 343, 346-47, 371, 351, 359-61, Corbin on p. 325.

<sup>41</sup> Ibid., pp. 247, 249, 389-92; on Mitchell's role in the outrage see pp. 457-59. For an analysis of the party which followed the murder see Lacy K. Ford, Jr., "One Southern Profile: Modernization and the Development of White Terror in York County, 1856-1876" (Master's Thesis, University of South Carolina, 1976), pp. i-iii.

the first count of the indictment was to prove that a Ku Klux Klan conspiracy existed, that the accused was a member of the Klan, and that the organization's purpose was to hinder blacks from voting. The second count required proof that the Klan conspired specifically to punish Jim Williams for having voted at a previous election.

A copy of the Obligation, Constitution, and By-Laws of the Ku Klux Klan served as the basis of proof that such a conspiracy existed. Major Merrill during the course of the investigations in York County had located the Constitution in the possession of Squire Samuel G. Brown, a prominent citizen of York county. This document stated that the Klan rejected the principles of the Radical party and supported "justice, humanity, and constitutional liberty, as bequeathed to us in its purity by our forefathers." The Klan Constitution went on to pledge mutual aid in the event of sickness or distress; females were to be the "special objects of our regard and protection." Blacks were barred from membership. The penalty prescribed by the oath for any member who divulged information pertaining to the organization was the "traitor's doom, which is Death! Death! Death!"<sup>42</sup> Several Klan members identified the constitution as that which they had promised to uphold. As a further basis for proof that a conspiracy existed the witnesses described the disguises worn by the nightriders and revealed

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<sup>42</sup>Constitution and Bylaws in Proceedings, pp. 175-76.

a number of secret signs and signals by which they had recognized members of the Klan.

Throughout the trial the government attorneys focused attention to the political nature and purpose of the Klan. The meaning of the Klan Obligation, with its dedication to constitutional purity, Corbin insisted, was that the organization supported the constitution "as it was, not as it is now--not with the thirteenth, fourteenth and fifteenth amendments in it. . . . we reject the results of the late war. We trample upon these Amendments of the Constitution, and we intend to destroy and defeat them."<sup>43</sup> Kirkland Gunn, a former Klansman, for example, stated that the goals of the Klan were to be accomplished by "killing off the white Radicals, and by whipping and intimidating the negroes, so as to keep them from voting for any men who held Radical offices." Charles Foster said that the Klansmen rode to "put down Radicalism;" the method employed was "to whip them and make them change their politics." Dick Wilson, a Union League member and victim of the Klan, related that the nightriders came to his house "because you damned niggers are ruining the country, voting for men who are breaking the treasury. . ." After a brutal beating by the Klan, Wilson had promised, "I will vote any way you want me to vote; I don't care how you want me to vote, master, I will vote."<sup>44</sup>

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<sup>43</sup>Ibid., pp. 432-33.

<sup>44</sup>Ibid., pp. 178, 203, 283-84.

Having established the political nature and purpose of the Klan, the prosecution next proceeded to demonstrate that the defendant was a member of the conspiracy and that he had participated in the raid on Jim Williams. Several witnesses testified that they had ridden with Mitchell on the night of the murder. Each witness insisted, however, that he had known nothing of the crime, but had remained in a thicket with the horses while a group of about ten, led by Dr. Bratton, committed the offense. When one of the witnesses asked Bratton if he had found Williams and where he was, he was surprised to hear him say, "He is in hell, I expect." The witnesses made clear, also, that Mitchell was not one of the Klansmen in the advance party who had dragged Williams out and killed him. Like the witnesses for the prosecution, Mitchell had stayed in the woods with the horses.<sup>45</sup>

While the prosecution focused attention toward the political goals of the Ku Klux Klan, the defense attorneys sought to convince the jury that the Klan was a defense organization established solely to protect the white community from abuse by armed black soldiers. "We want to show," Henry Stanbery stated early in the trial proceedings, "that the overt act was connected, not with the voting matter, but with this arming matter and the danger apprehended." Jim Williams was murdered, according to the defense, not to prevent voting, but because of the alarm he

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<sup>45</sup>Ibid., pp. 244-49, 257-61, 261-67, 277-78.

had raised among the whites. It was strictly a matter of self defense. Julia Rainey, a witness for the defense, related that the "feeling in the country had become very alarming." Arson was common, and people were afraid of having their houses burned. The "disorderly conduct of the militia" caused people to dread an attack by the blacks. Clearly, her testimony suggested, the whites had to organize to defend hearth and home.<sup>46</sup> James Long testified that the armed blacks had created a state of alarm in his part of the county: "Folks were pretty much scared." Several witnesses insisted that Jim Williams was a dangerous man who had threatened to murder the white population "from the cradle up." William Bratton, for example, maintained that he had personally heard Williams make threats "that he would rule the country, and if he could do it in no other way, he intended to Ku Klux the white ladies and children, gin houses and barns." Minor McConnell reported that Williams had told him that "the people and me myself would see mighty

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<sup>46</sup>Ibid., pp. 231, 290-91. Arson was very common in upcountry South Carolina. The evidence is so convoluted it is difficult to ascertain exactly when the fires started and who burned what. Basically, however, the freedmen attacked property of whites (barns, ginhouses) to retaliate for outrages committed against blacks. Many fires followed the various Ku Klux Klan outrages. The Yorkville Enquirer on one occasion (16 February 1871) actually admitted that Klan outrages had preceded black arson. White arson focused on any means the blacks had of getting ahead; black schools and churches were a favorite target. On the difference between black and white arson see Magdol, A Right to the Land, pp. 129-30. See also Gustov Bychowski, Evil in Man: The Anatomy of Hate and Violence (New York: Grune & Stratton, 1968), pp. 52-54.

work when he took his company and went to Ku Kluxing." Stanbery summed up the testimony by arguing that while the Klan and the raid on Jim Williams were not "absolutely legal . . . it was such a duty as no man would shrink from who felt the fears felt in that neighborhood from the danger of leaving those arms in the hands of those men." Because the Governor had "armed the blacks and left the whites defenseless" the whites were forced to take matters into their own hands. The outrages of the Ku Klux Klan, according to the defense interpretation, were the natural result of the Governor's folly.<sup>47</sup>

The defense did not attempt to deny that the defendant had participated in the raid on Jim Williams. Stanbery made clear, however, that Mitchell had not actually been involved in the murder. He argued, moreover, that Mitchell had been charged with one offense, conspiracy against the franchise, and tried for another, namely murder. The defense attorney deplored the outrage which had been committed against the militia captain, but nonetheless maintained that the defendant should not be punished. He had known nothing of the plan to hang Jim Williams. Mitchell had understood the purpose of the raid--his first and last--was "to disarm Jim Williams and his colored company." He had no intention of taking away Williams' vote

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<sup>47</sup>Proceedings, pp. 302, 306, 311, 312, 342-43, 346-47, 405, 413.

or of punishing him for having voted the Radical ticket. "This young man," Stanberry argued, "supposed he was going for what he considered a proper purpose, and what I would consider a proper purpose if I had lived in that neighborhood."<sup>48</sup>

Stanberry admitted that someone ought to be punished for the crime, but that someone, according to the defense attorney, was not his client. "When you get Dr. Bratton," he continued, "deal with him. But for God's sake, don't make this young man his scape-goat. . . . Have the man who committed the crime before you, and then mete out the punishment."<sup>49</sup> Stanberry implored the black jurors to honor their race by demonstrating that they could acquit a white man. If they were determined to have a victim when the right man was not on trial, he said, "I do not want to see one of your race on a jury again." He seriously questioned whether the jurors could rise above their racial prejudice and consider the case on its merits. The defense attorney

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<sup>48</sup>Ibid., pp. 399-401, 412-15.

<sup>49</sup>Ibid., pp. 413-15. The government was trying desperately to get Dr. Bratton who had escaped to London, Ontario. U.S. government agents kidnapped Bratton when Canadian officials refused to extradite him. The Canadian Government sharply protested the action, however, and the United States returned the suspect. Louis F. Post, "A 'Carpetbagger' in South Carolina," Journal of Negro History 10 (July 1925): 330-33. After a five year exile Bratton was pardoned by Rutherford B. Hayes and allowed to return to South Carolina.

was surprised, in fact, that the jury had managed to listen to the case so attentively.<sup>50</sup>

Stanberry's condescending remarks to the predominantly black jury demonstrated that the defense attorney shared the local values as well as the local white constitutional principles. Like so many South Carolina Democrats he seemed to assume that the black quest for equality would lead inevitably to a quest for superiority. "I warn you colored men of South Carolina," he cautioned the jury, "if you attempt to make a step in advance of the white man, your doom is sealed." Throughout the trial Stanberry exhibited the same fear of armed blacks which he attributed to the white population of upcountry South Carolina. Jim Williams would not have drilled his men so thoroughly, he suggested, if he had not had some "secret motive" in mind, "a mission to fulfill." Clearly the defense attorney considered the black militia a grave danger to the white population. "I hope you of the colored race will not expect or desire to rule white men," he warned again in a closing argument. If the blacks were to have arms and the whites have none, "your triumph will be short and your doom inevitable."<sup>51</sup>

Reverdy Johnson, like Stanberry, addressed black jurors for the first time in the Ku Klux Klan trials. He insisted, however, that he held no prejudiced view of the jury: "We

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<sup>50</sup> Proceedings, pp. 399-400, 405-6, 414-15.

<sup>51</sup> Ibid., pp. 405-6.

are all children of the same Father." Johnson's attitude, nonetheless, betrayed his personal conviction that armed blacks were not to be tolerated. "In the name of justice and humanity," he declared, "in the name of those rights for which our fathers fought, you cannot subject the white man to the absolute and uncontrolled dominion of an armed force of a colored race." Johnson's expressed fear of the black militia spoke for whites throughout the state. Johnson pushed the fear issue hard, insisting that "each poor lady, as she laid down in her bed at night," had reason to believe the blacks would set her house on fire or rise up against her. "What is the husband to do," Johnson asked; "Band themselves together as a defense," of course. Who could possibly blame the Ku Klux Klan for their determination to defend hearth and home against the threat of angry, armed blacks?<sup>52</sup>

Johnson's closing arguments reiterated the notion that the government was attempting to convict Mitchell without "the least particle of evidence" that he had known the object of the raid on Jim Williams. "It is not proved," according to the defense, "that he made any attempt to do anything wrong, but upon him the wrongs done by others are to be visited, in the view of the prosecuting counsel, upon some notion of the law."<sup>53</sup>

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<sup>52</sup>Ibid., pp. 151, 425-26.

<sup>53</sup>Ibid., pp. 427-29.

Corbin, in his closing arguments for the government, made clear to the jurors that the defendant was not being tried for murder, as the defense had suggested, but for conspiracy. The defense had clouded the issue by maintaining that Mitchell should not be punished because he was not guilty of the murder. If the facts demonstrated that Mitchell was a member of the Ku Klux Klan, then he was guilty under the law of conspiracy for all the works of the Klan. The United States Government, Corbin argued, is a government of law. When a conspiracy exists "to rob our colored citizens of African descent of their newly acquired rights," then it is the duty of the government to intervene.<sup>54</sup>

The prosecutor reiterated his insistence that the Klan rode for political purposes; it was not a defense organization. The Klan constitution demonstrated in writing that its purpose was to "oppose and reject the principles of the Radical party." Toward that end the nightriders had committed such heinous crimes on those who dared to support the Radical ticket that the world will "shudder as it reads the testimony of this trial." It will be said "that the dark ages have come again, and the crimes of savages . . . present no parallel to these." It was the black militia,

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<sup>54</sup>Ibid., pp. 430-31.

according to Corbin, which was created in self defense. The Klan was organized in 1868; the militia in 1870.<sup>55</sup>

Corbin castigated the defense attorneys for their unwarranted remarks to the predominantly black jury. The freedmen, according to Corbin, had never aspired to or claimed "more than is conceded to white men." Rather they were attempting to elevate themselves "to become what the Constitution says they shall be--clothed in all the rights of American citizens." However much the whites of South Carolina and their "distinguished counsel" protested, "the laws of this state are equal and just. . . . The colored man in South Carolina is raised by the fundamental law of this State, and that law is supported by the Constitution of the United States, and by the conscience of the great American people, that the colored man shall be a citizen, and he shall be protected in all the rights of an American freeman."<sup>56</sup>

The prosecution's closing remarks stressed the historical importance of the Klan trials. Many ex-Confederate soldiers who had laid down their arms and promised to behave henceforth as good citizens had conspired instead to undermine the results of the late War. The verdict in this trial, according to Corbin, would "mark an era in the history of the administration of justice in South

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<sup>55</sup>Ibid., pp. 432-443.

<sup>56</sup>Ibid., pp. 444-45.

Carolina" and demonstrate to the people of the state and the entire South "that the rights of the newly enfranchised citizens shall be protected." The government was determined, Corbin insisted, "that this organization to defeat the rights of our colored fellow-citizens, must and shall be put down." The district attorney thanked the jurors for their patience throughout the long trial and anticipated the verdict with confidence.<sup>57</sup>

Judge Bond in his charge to the jury made clear that the defendant was being tried for conspiracy, "not the particular acts done in pursuance of it." The purpose of the Ku Klux Klan, according to the judge, did not have to be single. If one of its purposes was that set forth in either count of the indictment, then the person engaged in it could be punished. Each member of the conspiracy, Bond emphasized "is responsible, personally, for every act of the conspiracy and for the acts of each member thereof." It made no difference in the law of conspiracy whether the defendant was actually present when a crime was committed. It was up to the jury to decide whether a conspiracy did in fact exist to deprive the freedmen of their right to vote. If it did, and Mitchell was a member, then he was guilty of all the overt acts committed by the Klan. Similarly, if the Klan had conspired to injure Jim Williams for having previously voted, and Mitchell was a member of the Klan, then Mitchell

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<sup>57</sup> Ibid., pp. 448-49.

was guilty of the second count whether or not he had actually harmed Williams. It was up to the jury, however, to determine the actual reason for the violence.<sup>58</sup> The jurors, had little regard for the nicest arguments of the defense lawyers. They found the defendant "guilty of the general conspiracy" after less than an hour of deliberation. Judge Bond explained, however, that they must find the prisoner guilty or not guilty on one or both of the counts. After further deliberation the jurors returned a verdict of "guilty on the second count, not guilty on the first."<sup>59</sup>

Although Judge Bond had insisted that each member of the Ku Klux Klan was responsible for all the deeds of the organization, he sentenced Mitchell with a keen regard for the fact that he had not actually participated in the murder of Jim Williams. If the court had "any intimation that you had countenanced" the murder, he said, we "would exhaust the full penalty of the law and then consider that you had been very mercifully dealt with." Because Mitchell had confessed and "dealt candidly with the Court," his punishment was light--eighteen months imprisonment and a fine of one hundred dollars. The judge was firm but fair; clearly he recognized that Mitchell was not one of the leading members of the Klan.

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<sup>58</sup>Ibid., p. 451.

<sup>59</sup>Ibid., p.451.

Thus ended the first of the South Carolina Ku Klux Klan trials. Three weeks of intense effort by the opposing sides had resulted in the conviction of one rather insignificant Klan member, Robert Hayes Mitchell.<sup>60</sup> Hundreds more awaited trial. The most wanted Klansmen were still at large. Whether or not the government would ever be able to prosecute the leading members who were responsible for the most heinous crimes remained to be seen. Doubt remained, also, on the most significant constitutional questions which had been raised. The fourth federal circuit court had provided a forum for the opposing sides to air their interpretations of the Reconstruction Amendments as well as their conflicting views of the Klan's purposes. The prosecution had failed to convince the judges that the Fifteenth Amendment provided a positive right to vote or that the Fourteenth Amendment had radically altered the federal system, granting the national government authority to protect citizens in their individual rights. The institutional nature of the two-headed circuit court had doubtless contributed to the prosecution's difficulty in securing its nationalistic goals, but Judge Bond, the radical Republican judge who had been expected to support

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<sup>60</sup>Mitchell's name had been severed from the original indictment which included the names of many Klansmen who had participated in the raid on Jim Williams. He was probably chosen simply because he was available and waiting for trial. When he was sentenced he declared that he would have pleaded guilty, but his attorney would not let him.

the government's policy, had demonstrated a cool reception to the more novel constitutional goals of the prosecution. Judge Bond, like so many federal judges during this period, was locked into a traditional notion of dual federalism which precluded his acceptance of a major alteration of the federal system. Although Bond was not convinced that the Fourteenth Amendment nationalized the Bill of Rights, he had nonetheless agreed to disagree on the Second Amendment question and the issue of trying common law crimes in federal court. The highest court in the land would thus have the opportunity to consider the problems. If the government attorneys had failed to secure their more novel constitutional goals, they had nonetheless managed to convict, despite the best efforts of some of the finest and most expensive legal talent in the nation. The guilty verdict signaled that the South Carolina nightriders must yield to the rule of law. And the prosecution had successfully developed a strategy which could be used in the succeeding trials.

CHAPTER 5  
THE KU KLUX KLAN IN COURT

Although the United States attorneys had secured a conviction in U.S. v. Robert Hayes Mitchell the trial had been largely a failure in terms of constitutional goals. So novel were the prosecution's constitutional arguments that they had not even convinced the reportedly Radical Republican Judge Hugh Bond. Subsequent efforts by the government proved similarly disappointing. For all their success in winning convictions time after time on conspiracy charges, the government attorneys were unable to prosecute the most wanted Klansmen. Those who stood trial were generally not the affluent and influential members of the community most responsible for the Klan's activities. Further efforts to secure a Supreme Court ruling on the constitutional issues were no more successful. The Yankee government achieved an enviable conviction rate, but the long term goal of changing the social and political structure of South Carolina was a failure.

The trial strategy developed by the government attorneys in Mitchell nevertheless assured a perfect conviction record in the subsequent Ku Klux Klan trials during the November 1871 session of the Fourth Circuit

Court. The prosecution followed the same procedures in each case which had brought a guilty verdict in the first. First witnesses identified the Constitution and oath of the Klan as that which they had promised to uphold. Then they described the disguises worn by the nightriders and revealed a number of secret signs and signals by which they had identified themselves as members of the Klan. Numerous witnesses in each trial testified that the Klan's overriding purpose was political. Having established the nature and purpose of the Klan, the prosecution next proceeded to establish the connection between the defendants and the conspiracy. Black citizens related the details of outrages committed against them and sometimes identified the accused as among those who had perpetrated the crimes. Klan members who had become government witnesses identified the defendants as members of the Klan with whom they had ridden. In three out of the four cases which followed Mitchell, this strategy was simple, straightforward, and successful, although two of the trials were long. Corbin directed testimony toward the political nature of the Klan in order to prove the outrages resulted from a conspiracy to obstruct voting rights.<sup>1</sup>

The prosecution modified this strategy in the second case to be tried, U.S. v. John W. Mitchell and Thomas B. Whitesides. As prominent members of their community in York

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<sup>1</sup>Proceedings, *passim*.

County, Mitchell and Whitesides were precisely the sort of men Attorney General Akerman had advised Corbin to prosecute first. If men of their position and influence had united against the Klan, the Enforcement Acts would have been unnecessary. Instead Mitchell was a Klan chief, and Whitesides, a physician, had participated in at least one raid. The government attorneys massed their evidence against the Klan in this trial to demonstrate the extent of Klan atrocities and put the responsibility for the Klan's outrages squarely on the shoulders of those members of the community in places of leadership. The four-count indictment charged a general conspiracy to obstruct voting rights in the past and to prevent blacks from voting in future elections. It further charged a special conspiracy against Charles Leach, the victim of a Klan raid in which both Mitchell and Whitesides had participated. Leach, a black Republican and Union League member, testified that thirty to forty Klan members broke into his home, demanded his guns (he had none), dragged him outdoors, then administered some fifty to seventy-five lashes with hickories as large as his thumb. Wounded from his waist to his shoulders, the freedman was unable to work for a week.<sup>2</sup>

Corbin initially proceeded as he had done in the preceding trial, proving that the Klan was a conspiracy to

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<sup>2</sup>Trial is in Proceedings, pp. 460-606; explanation of indictment on pp. 586-87. See also Hugh Bond to Anna Bond, 18 December 1871, Bond Papers, Maryland Historical Society.

deny the political rights of Republicans, particularly blacks. Kirkland Gunn, a former Ku Klux member, testified, for example, that the purpose of the Klan was "to put down the Radical party and rule negro suffrage." A freedman stated that the Klan had vowed to "make me a good old Democrat." Corbin next produced witnesses who testified that they had participated in Klan raids with the defendants. Charles Foster stated that he had ridden with both Whitesides and Mitchell on January 9th, 1871, when the Klan had outraged a number of Republicans, including Charles Leach. Black victims of the Klan's outrages then identified the accused as among those who had terrorized them.<sup>3</sup>

The prosecution could doubtless have closed its case at this point and obtained convictions from the predominantly black jury. Instead the government presented a veritable parade of atrocities for the record. While reporters from across the nation were gathered in South Carolina, the government seized the opportunity to release the ugly truth about the Ku Klux Klan to the entire nation. The defendants, Mitchell and Whitesides, had not participated in most of the crimes detailed in this trial, and the connection between some of these outrages and the political rights of black males was tenuous at best. Clearly the government had purposes in mind which went beyond the guilt or innocence of the accused. An interesting aspect of this

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<sup>3</sup>Proceedings, pp. 473-74, 480, 496, 510, 516.

trial is the number of female witnesses who took the stand to testify in a case concerned with Fifteenth Amendment rights. One black woman testified, for example, that several Klansmen who had previously visited her home "came back" a second time "after my ole man." Failing to find the Republican husband at home, the frustrated nightriders broke into the house, stole food from her kitchen, then dragged her outside and raped her in turn. The Klan returned yet another time when they burned her home to the ground. Another woman reported that Klansmen whipped her severely when they did not find her husband at home. She probably escaped rape by her steadfast refusal to "lie down" for the men who attacked her. Several other women testified as witnesses for the prosecution relating their treatment at the hands of the Klan and their lack of security in their own homes. A male witness, a former Ku Klux, described a raid in which the nightriders poured tar into the "privates" of a white woman who concealed two black men in her home. Several other witnesses recounted at length the Klan's attack on Tom Roundtree, brutally murdered by the nightriders--shot for daring to defend himself against the Klan, then his throat cut from ear to ear--but not by either of the defendants.<sup>4</sup>

The prosecution developed this strategy to reveal the extent of Klan brutality in upcountry South Carolina.

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<sup>4</sup>Ibid., pp. 501-11.

Democratic papers throughout the nation had scoffed at the government's efforts to stop the Klan, insisting that it was not serious, or that its purpose was self defense. They had sneered at the humble black citizens who came to testify and had complained of the "packed juries" who would not give the misunderstood nightriders a fair hearing.<sup>5</sup> Now the courtroom drama reached its peak. The government attorneys had the attention of the entire nation, and they proceeded to portray the Ku Klux Klan in all its horror. If the prosecution had failed to gain its major constitutional goals, it would nonetheless demonstrate the seriousness of the Klan. With this object Judge Bond fully concurred. He pressed the witnesses for more of the gory details, insisting that all the truth be revealed. "Let the witness detail all the circumstances," he told the prosecutor. "Tell me, exactly, how they did it," he encouraged a witness. The presiding judge insisted on knowing the extent of the victims' wounds and whether they were able to walk after they had been whipped. Several times during this trial Bond insisted that the black victims of the Klan should be allowed to "tell the story" in their own way without the interruption of the attorney's questions.

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<sup>5</sup>See for example, Charleston Daily Courier, 2, 11, and 29 November 1871, 14, 15, 21, and 22 December 1871.

Clearly he deemed it important to "let the people hear and let the jury know what things exist about us."<sup>6</sup>

Because the prosecution's efforts to incorporate the Second and Fourth Amendments had failed to convince the judges, leaving the national government without the constitutional means to protect the families of the freedmen, the government attempted to connect outrages committed against women and children with the conspiracy to defeat the Radical Party. When the Klansmen whipped and ravished women, according to the government attorneys, it was not only "to gratify their lusts" but also "to punish them" because they would not reveal the whereabouts of their Radical husbands. By injuring the families of Republicans, the Ku Klux Klan forced the Republican voters to pay "the penalty for their radicalism" and "deterring them from voting at future elections."<sup>7</sup> Thus the government in this trial spread a net of responsibility for the atrocities committed by the Klan which stretched far beyond what the indictment had actually charged.

Chamberlain's closing arguments emphasized that men of substance, standing, and education like Whitesides and Mitchell, whether directly involved or not, bore heavy moral responsibility for all the crimes which the Klan had committed. These defendants were "nobody's dupes." Unlike

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<sup>6</sup>Proceedings, pp. 481, 487, 489, 498, 507-8.

<sup>7</sup> Ibid., pp. 593-94.

Robert Hayes Mitchell and many of the other Klansmen who had been indicted, they could not claim "any exemption from the full responsibility of what they have done, and what they intended, on the ground that they occupied a humble position in society." Nor could they insist that they were swept along against their better judgment. These were men who were accustomed to leading their community. It was to men like Mitchell and Whitesides that others looked for guidance. Thus "the full responsibility for acts done and purposes planned is to be visited upon such defendants." As co-conspirators, moreover, they were legally responsible for all the atrocities committed by the Klan.<sup>8</sup>

Democratic papers across the nation quickly expressed their horror that the federal government would attempt to implicate men of such excellent reputation in these heinous crimes. "Even the seductive allurements of a city courtesan would appeal in vain," they insisted, to the "gentlemen of wealth and refinement, having charming families" who were on trial. That they would even touch such a "filthy-looking fright of a negress" was unthinkable. If such crimes had been committed, and allowance had to be made "for the exaggerations of the witnesses who are mostly ignorant

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<sup>8</sup>Ibid., pp. 585-87.

negroes," then they were obviously done only by the lower class.<sup>9</sup>

While the prosecution focused the attention of both the jury and the nation upon the full extent of Klan atrocities, the defense demonstrated that the two men on trial were innocent of the Klan's more heinous crimes. Whitesides and Mitchell depended upon their personal, local counsel. Stanbery and Johnson remained in South Carolina, but no longer conducted the day to day defense of the Klan. Whitesides' attorney, W. B. Wilson, insisted that his client was completely innocent, that in fact he had never even joined the Klan. A witness for the prosecution, on cross-examination testified that he had reason to believe Whitesides was not a Klansman. The witness had given the defendant the secret signs of the Klan which Whitesides had failed to return. Another government witness testified in rebuttal, however, that he had personally helped Whitesides to secure his disguise and borrow a saddle so that he could ride with the Klan. The witness then rode alongside the defendant. A second ex-Klansman, also a government witness, stated that he thought Whitesides had participated in only one raid. The witness had a conversation with the defendant shortly after that "one time," during which Whitesides said that he "was opposed to it." The Klan was "running all his

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<sup>9</sup>New York World, 26 December 1871, as quoted in Charleston Daily Courier, 4 January 1872; see also Charleston Daily Courier, 22 December 1871.

hands off, and he would be obliged to suffer if they didn't stop it." Charles Leach, victim of the Ku Klux raid for which Whitesides was charged, testified that the doctor had been kind to the freedmen. Leach had personally received a bushel of free corn from Whitesides in a time of need. He refused to say, however, that he had heard of the doctor giving free medical attention to the blacks. Nonetheless Leach had "never heard anything against Dr. Whitesides, no way."<sup>10</sup>

Mitchell's attorney, C.D. Melton, could hardly insist that his client had never participated in the Ku Klux Klan. Several government witnesses had testified that they personally knew Mitchell to be a Klan chief. The defense attorney insisted instead that his client was not guilty because the Klan was never "designed or intended to interfere with African citizens as a class" or to "prevent them from exercising the right of citizens to vote." He produced black witnesses who made the point that Mitchell was "kindly disposed towards the colored people." Mitchell wanted the freedmen "to live and do well; if they were responsible people and wanted help . . . they were to go to him about it."<sup>11</sup> The defense directed its primary efforts toward demonstrating that Mitchell had not participated in the raid on Charles Leach. Mitchell and Whitesides, with

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<sup>10</sup> Proceedings, pp. 477, 480, 490-92, 520.

<sup>11</sup> Ibid., pp. 563, 580.

the cooperation of their attorneys and a "host of witnesses" including another physician, family, and friends, constructed an elaborate alibi which seemed at first guaranteed to succeed. On the ninth of January, numerous witnesses testified, Mitchell's elderly mother had suddenly taken sick with "epilepsy and a fit." Mitchell went to fetch Dr. Whitesides and another physician, Dr. Dawson. So ill was the old lady that the two doctors and the entire family including the defendant had sat up with her all night. Witness after witness recounted the event, both family members and the other physician who was certain of the date because he had fixed it in his log. Each was certain of the date, and each testified that he or she had heard about the raid on Charles Leach the following day when Mitchell's young son had brought the news from the post office.<sup>12</sup>

The alibi obviously depended upon the precise date which had been fixed by the government witnesses. The date, however, was not as definite as the defense attorney attempted to make it. Although an important government witness, Charles Foster, had fixed the date on January 9th, others had placed it variously as the Monday after Christmas, a Monday shortly after Christmas, and a Monday sometime in January. Neither Charles Leach nor his wife

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<sup>12</sup>Ibid., pp. 518, 522-24, 530-556, 580. On cross examination the witnesses failed to have such accurate recall about other Klan atrocities.

could determine the exact date on which they had been outraged. The prosecution, in rebuttal, was able to produce a witness who could demonstrate that the date on which the alibi depended was wrong. The Klan had visited William Wilson, a white Republican, one week before the raid on Charles Leach. On the night of the raid, Mrs. Wilson had been confined to her bed following the birth of a child. Naturally they knew the exact birthdate of their child. Through their testimony and that of Amos Howell who stated with certainty that he had been whipped during the week of January 25th, the government was able to destroy the defense alibi. Numerous participants had already testified that both Leach and Howell were outraged on the same night.<sup>13</sup>

The trial of Mitchell and Whitesides, as the stenographer on the job reported to Attorney General Akerman, "afforded a good illustration of the necessity of a verbatim report of the testimony." The government attorneys were able to examine the trial records to determine that Charles Foster was the only witness who had fixed the date of the outrage on the same date of the alibi. Evidence suggested that Foster had been led to fix the date by "rumors started by the defense." Foster in rebuttal admitted he was not positive of the date. Without a

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<sup>13</sup>Ibid., pp. 480, 491-92, 572, 575-76, 600.

stenographer's record, the government "would certainly have been worsted."<sup>14</sup>

Because of the careful trial record, the government gained two more convictions. The jury returned guilty verdicts for both Whitesides and Mitchell, finding the defendants guilty of the first and third counts, not guilty of the second and fourth. Although this trial was relatively unimportant in terms of constitutional argument and experimentation, it nonetheless advanced the government's goal of prosecuting first those Klansmen of property and authority who were in a position to persuade their neighbors to live peaceably with the new political order. The successful prosecution of influential members of the white community signaled to the entire South that the government was seriously committed to establishing civil and political rights for the freedmen regardless of the opposition. And the trial accomplished another purpose which the government considered important. The record of atrocities which had been "repeated in this Court" would "go forth to the world in the public prints." The world, or at least the nation, would recognize the suffering of the Klan's innocent victims, both male and female, and rise to support the more radical goals of the Republican Party.<sup>15</sup>

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<sup>14</sup>Ibid., pp. 480, 572; Ben Pitman to A. T. Akerman, 29 December 1871, S.C.F., S.C.

<sup>15</sup>Proceedings, pp. 593-94.

The prosecution continued its policy of implicating prominent members of the community and publishing the gory details of the Klan outrages in the next trial, that of John S. Millar.<sup>16</sup> However in this case the government was perhaps overzealous in its desire to prosecute men of substance. Millar was a plantation owner who "had a great many hands to work for him." He was indicted under the first section of the Enforcement Act of May 31, 1870 on a single count of conspiracy to prevent male citizens of African descent from voting. Proceeding in the usual manner, the government established the political nature and purpose of the Klan. One witness testified, for example, that "the general purpose of the Ku Klux Klan order was to keep the Radical Party from voting. . . by raiding amongst them in the night time." The intention of the Klan, according to a former member, was "to tear down the party in power and build up the other party." This goal was to be accomplished by "whipping and Killing." Witnesses identified the Constitution and oath of the Klan and demonstrated secret signs and signals by which the members identified themselves.<sup>17</sup>

If the government attorneys were successful in demonstrating, once again, the odious nature of the Klan,

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<sup>16</sup>The trial record in the Proceedings, pp. 607-53.

<sup>17</sup> The indictment is reprinted in KKK Reports 5: 1919-20; Proceedings, pp. 608, 628.

they were less so in connecting the defendant to the Klan's outrages. The prosecution established only that Millar had attended two meetings of the Klan. Ex-Klansmen testified that they had seen Millar at an election where the Klan chief, grand Turk, and Cyclops were chosen. According to these witnesses, Millar had voted along with all the other members. They insisted, moreover, that people who were not Klan members were not allowed to attend meetings "unless they wish to go into it." Members were initiated the first time they attended, thus there was "never any person present only those sworn in." Although Millar had definitely attended Klan meetings, there was no evidence whatever that he had ever ridden with the Klan. Even the witnesses for the prosecution insisted that he had returned to his home rather than going on a raid because he had no disguise "or may be naturally [he] didn't want to go."<sup>18</sup>

The defense attempted to establish doubt whether Millar was actually a Klan member or whether he had merely attended the meetings with his cousin "out of curiosity." No one had ever seen Millar with a disguise. No one had seen him take the oath. The government witnesses, on cross examination, admitted they were not certain that Millar had actually voted at the election.<sup>19</sup>

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<sup>18</sup>Ibid., pp. 615-16, 623, 638.

<sup>19</sup>Ibid., pp. 610, 619, 623, 635.

Millar, like the other defendants in the Klan trials was not allowed to testify during his own trial.<sup>20</sup> He had appeared as a witness for the defense in the previous trial (Mitchell and Whitesides), however, where he had stated that he had never been a Klan member. He had attended only two meetings, he insisted, because the Klan had threatened to visit him. "I thought I would like to know when they would be riding around," he said, "so I might watch for them." His cousin had encouraged him to attend the meetings to determine if he wanted to join; "He knew I would just keep it safe." Millar's connection with the Klan, it seemed, was tenuous at most.<sup>21</sup>

The trial of John S. Millar demonstrated more than anything else the pressure upon the white population in upcountry South Carolina to join the Ku Klux Klan and the difficulty of remaining outside the organization. Testimony demonstrated that Millar himself had been visited by the Klan on at least one occasion. Some of the freedmen had taken their guns to Millar's place to prevent the Klan from "getting them and breaking them to pieces." The Klan wanted the guns, and it wanted Millar. The defendant hid in a back room while his mother swore that "there was nobody there but an old woman, and for God's sake they were not to scare

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<sup>20</sup>Ibid., p. 645. On this aspect of the Klan trials see Charleston Daily Courier, 23 April 1872.

<sup>21</sup>Proceedings, pp. 526-29.

her." Daniel McClure, the black captain of the roadwork in the area "by the influence of Mr. Millar" lived with Millar and testified that he did not think Millar "was in favor of the Ku Klux organization" but rather "was scared of them." A freedman who lived on Millar's plantation swore that Millar never "interfered in any way with the voting of colored people." He remembered that Millar was not planning to vote in the election of 1870, "but if he was he did not know but that he would vote the radical ticket."<sup>22</sup>

Daniel Carroll, a white neighbor of Millar, testified that Millar had attended the Klan meeting only to learn the purposes of the organization. Carroll thought Millar had "kindly feelings toward the Radical Party." Pressure from the white community, however, had made it difficult for whites to remain aloof from the Klan. White Republicans all over the upcountry--having received visitors in the night--were announcing in the papers their withdrawal from the Party. Carroll had voted Republican, but he was eventually "obliged to join the organization." He admitted that he had joined the Ku Klux Klan and taken the oath, but "it was to protect myself and my colored hands." According to Carroll,

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<sup>22</sup>Ibid., 641-43. A witness for the prosecution also referred to the raid on Millar's place; see p. 625.

Millar had similarly attended the meeting "to save his hands."<sup>23</sup>

Like the testimony of the defense witnesses, the testimony of witnesses for the prosecution demonstrated the enormous pressure on the white community to conform to Klan values and aspirations. Reluctant nightriders were summoned to join the organization and then to participate in the outrages which terrorized the freedmen. The owner of a country store and drinking establishment testified, for example, that the Klan had come to his place at night, threatening him with violence, demanding a good part of his whiskey, and insisting that he close his place of business. He had joined the Klan for safety's sake even though he "didn't care anything about going into it." Klan members coerced the witness into the organization stating that he would have been shot if they had not saved him, and he "had better go into it." He did.<sup>24</sup>

Testimony regarding a murder committed by the Klan demonstrated another way the Klan established control over reluctant members of the white community. Klan members who declined to participate in the crimes, government testimony revealed, were ordered by their superiors in the

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<sup>23</sup>Ibid., pp. 643-44. For an interview with another Klansman who had received a whipping at the hands of the Klan and decided to join "so that I could live in peace," see New York Times, 11 November 1871.

<sup>24</sup>Proceedings, pp. 611-13.

organization to help dispose of the body of Charley Good, a freedman who had been killed for his "rather defiant" support of the Radical party and its principles. Both Thomas Berry and Lawson Davis testified that they were summoned to participate in the "burial," where Good was thrown into the river and anchored with plow shares. The Klan's intention, according to Davis, "was to get all the white men in the community to assist in removing the body." The murderers "didn't want anybody left behind, so that no information could leak out in reference to Good." If all the members of the white community were implicated in the crime, then no one could be free to oppose the Klan or reveal the truth. Opposition to the Klan was dangerous for white people in upcountry South Carolina.<sup>25</sup>

Millar's attorney in his closing arguments stressed the idea that Millar was "both alarmed and fearful of this organization." Millar was not a member of the Klan, according to the defense, but had attended meetings only "to protect himself and to protect the colored men in his employment." District Attorney Corbin insisted, however, that Millar's attendance at the meetings proved his membership in the Klan. "Do you suppose for one moment," he argued, "that band of conspirators, who had been present at murders . . . would have permitted this man to be present if he had not been a member of the organization, and if he was

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<sup>25</sup>Ibid., pp. 628-31, 635-38.

not known to be a member?" Corbin reminded the jury, moreover, that Millar was being tried for conspiracy. Under the law of conspiracy, Millar was guilty of the offense if he was a member of the Klan whether or not he had actually participated in the Klan's outrages. "A man is known," the District Attorney stated, "by the company he keeps." The jury--all black with the exception of its white foreman--agreed. As in the previous Klan trials the jury quickly returned a guilty verdict.<sup>26</sup>

The Millar case, in retrospect, seems a poor choice for prosecution. Attorney General Akerman had advised Corbin to proceed first with those persons in places of influence who had committed serious crimes. Millar was apparently innocent of committing outrages; the government did not even attempt to prove that he had done anything more serious than attend Klan meetings. With hundreds of indictments prepared and many other Klansmen who had committed more serious offenses awaiting trial, the case of John S. Millar seems trivial and downright mean spirited by comparison. Perhaps Millar was chosen because he owned a large plantation and employed many laborers.

The fourth and final trial of the November 1871 term of the Fourth Circuit Court began on December 29, 1871, the twenty-third day of proceedings. Edward T. Avery, the defendant, was exactly the kind of man the government had

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<sup>26</sup>Ibid., pp. 644-46, 649-51.

hoped to prosecute successfully as a signal that the elite could no longer persecute the freedmen or coerce their white neighbors to follow their political lead. Avery was a prominent physician who lived in the Ebenezer community near Rock Hill. He was indicted on four counts, one charging a general conspiracy against the suffrage, the others charging threats, intimidation, and interference with Samuel Sturgis in his right to vote.<sup>27</sup>

The prosecution proceeded initially as it had done in the previous trials, demonstrating first the existence of the Ku Klux Klan and its political purpose. Witnesses revealed that the Klan members were willing to go as far as murder to carry out the purposes of the Klan. The bulk of the testimony, however, concentrated on the outrages which were allegedly committed by the defendant.<sup>28</sup>

Testimony indicated that several Klan members with Dr. Avery at the lead had visited Sturgis one night at the home of Abram Brumfield. Both Brumfield and Sturgis were known to be radicals. When Brumfield managed to escape, the Klan concentrated its wrath on Sturgis. They knocked him down, kicked him around, damaged his wrist permanently, then put a buggy line around his neck and dragged him around. They lifted him by the line until his toes were unable to touch the floor. This "hanging" left the old man with a swollen

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<sup>27</sup>Trial is in Proceedings, pp. 654-763.

<sup>28</sup>Ibid., pp. 654-672.

neck for weeks. Brumfield, Mrs. Brumfield, and Sturgis had all recognized Avery as one of the assailants. They lived in the neighborhood with Avery and knew his voice and appearance well. Each testified that despite the Klan disguise he recognized the defendant by his mustache, his voice, and his crippled left hand which had been injured in the war.<sup>29</sup>

On the night they outraged Sturgis, the nightriders had also visited the home of a black preacher, Isaac Postle, known in the community as Isaac the Apostle. The Postles, like Sturgis and the Brumfields testified that they had definitely recognized Dr. Avery. Mrs. Postle had hidden her husband under the floor when they heard the Ku Klux approaching. When the woman "some seven or eight months gone in travail" with another baby in her arms refused to reveal her husband's whereabouts, Avery, himself the father of a young family, had knocked her to the floor, then pinned her baby down with his foot while another Klan member stepped on Mrs. Postle. Then they "beat my head against the side of the house till I had no sense hardly left." Avery allegedly put a line around the woman's neck as the nightriders had done with Sturgis. Reaching up to remove the line, she felt his crippled hand. "I knows you," she thought.<sup>30</sup>

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<sup>29</sup>Ibid., pp. 672-686.

<sup>30</sup>Ibid., pp. 689-91.

Finding the preacher under the floor, the Klan members took him away from the house and demanded to know if he had not "been preaching up burning and corruption." He assured them that he "never preached nothing but peace and harmony." Unconvinced, the nightriders hung him from a tree so that only his toes touched the ground and he was "choked and could not tell them anything." They repeated this process over and over. Postle insisted "ever so many times" that he did not "advise or instruct anything that was wrong," but his reassurances simply did not "seem to have any impression."<sup>31</sup>

While her husband was locked up in the York county jail for the crimes against Brumfield and Postle, Mrs. Avery set about to free him. In this mission she enlisted the assistance of her minister, the Reverend Robert E. Cooper. Cooper visited Postle and insisted that he accompany him the next day to see Mrs. Avery. There Mrs. Avery insisted that she had "lawful evidence" that her husband had not committed the crimes. She demanded that Postle sign an affidavit stating that the charges were false. Postle doubted that she could produce such evidence, but the woman, assisted by the white minister and two household servants continued to wear him down "for a considerable time." Postle "felt very small," he testified, "being with a lady like her--of her ability and position--and I felt it was almost wrong not to

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<sup>31</sup>Ibid., pp. 692-93.

submit to her." Finally Mrs. Avery threatened that Postle would be arrested for perjury if he would not yield. She would have him "cropped and branded and penitentiaried for ten years and perhaps for your lifetime." Still unconvinced, Postle finally agreed to withdraw charges "on their oath," but "not on my oath."<sup>32</sup>

The defense attorneys Wilson and Colonel F. W. McMaster produced in court an affidavit signed by the black preacher stating that "according to the evidence now appearing" the charges against Dr. Avery were false. Postle insisted in court, however, that he had never believed Mrs. Avery, Rev. Cooper, or the two black women, servants of the Avery family, who all insisted that Avery had been in his own bed the night of the Klan raids. Postle understood the paper he signed to mean that if their story was accurate, then Avery had not outraged him. He remained certain throughout, however, that the defense's alibi was false.<sup>33</sup> The federal district attorney agreed. Corbin brought charges of conspiracy by force, intimidation, and threats to prevent Postle from testifying in the case. The grand jury found a

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<sup>32</sup>Ibid., pp. 695-99. See also Criminal Case Records, S. C., roll number 156.

<sup>33</sup>Proceedings, pp. 692-99; affidavit on p. 695. See also testimony of Rev. Cooper, p. 710. The black women testified that they had been in and out of the bedroom during the night to attend Avery's baby who was sick. Their testimony differed, however, on the nature of the infant's distress; cf. pp. 717 and 726.

true bill, but the conspirators were never tried. The charges were discontinued in April, 1873.<sup>34</sup>

Having failed in their efforts to establish an alibi, Avery's attorneys produced an expert witness to testify in his behalf. Dr. Tally was a physician, former Confederate surgeon, and expert on gunshot wounds by virtue of his experience in the Confederate Army. Tally testified that the nature of Avery's wound rendered him completely unable to raise his arm in the manner necessary to tie a buggy line around the neck of the witness. If someone with a wounded hand had committed such an outrage, according to his story, it could not have been Avery. Tally exhibited the injured hand to the jurors, demonstrating that Avery was limited in the use of his hand. The testimony of the doctor, however, did not affect the legitimacy of the charges against Dr. Avery. While Mrs. Postle had indeed testified that Avery put the line around her neck, Sam Sturgis, against whom Avery was charged, stated it was a black man who accompanied Avery who had actually tied the line around his neck.<sup>35</sup>

Avery clearly decided that the case against him was strong enough to convict, despite the efforts of his

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<sup>34</sup>Ibid., p. 748. Mrs. Mary Avery, Robert E. Cooper, and the servants, Louisa Chambers and Kitty Avery, were all charged with conspiracy to prevent Postle from testifying in the case and to obstruct the cause of justice. The indictment is in the Criminal Case Records, S.C., roll number 156.

<sup>35</sup>Proceedings, pp. 729-31, 688, 690-91.

attorneys. As the closing arguments began on Monday morning, Corbin suddenly realized that the defendant was not in court. He demanded to know Avery's whereabouts. F.W. McMaster, Avery's attorney, stated that was for Corbin "to find out." When McMaster refused again to answer, Judge Bond was infuriated. He angrily instructed the clerk to "lay a rule on Mr. McMaster to answer the question or show cause why he should not be thrown over the bar." Avery had disappeared forfeiting his \$3,000.00 bail. After arguments from both sides to determine how to proceed, the judges allowed the attorneys to continue their final arguments. The jury, predictably, was totally unimpressed with the defense's claims of innocence. After a lapse of only fifteen minutes they returned with a guilty verdict. Sentencing, however, would have to wait until Avery could be located.<sup>36</sup>

Two days later Colonel McMaster was tried for contempt. The defense attorney's defense attorneys argued that "it was not his duty to become an informer against his client." Instead they insisted, had the defense attorney "attempted to betray the confidence of his client, he would have deserved the reprimand of the Court." They even suggested that forfeiture of the bond represented full payment for the disappearance of their client. Corbin and Chamberlain

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<sup>36</sup>Ibid., pp. 748-63. See also Minute Book, pp. 558-59, 573.

submitted authorities which stated that attorneys could be struck from the roll for ill-practice, fraud or dishonesty against the obvious rules of justice. Allowing the defendant to escape was not a matter of privileged communication but "a palpable and direct attempt not to act as an officer of the Court, but to act in defiance of the Court." The bail by no means, they argued, set a price for the worth of the defendant but served as a guarantee that he would appear "to stand his defense and meet his verdict." The U.S. attorneys recommended disbarring McMasters "to protect the integrity of the bar" and prevent others from assisting criminals "in escaping from the meshes of the law."<sup>37</sup>

The Charleston Daily Courier labeled the hearing the "dying struggle of the tribunal which has been working in the interest of the Grant dynasty for the past six weeks." McMasters' case was held under advisement, according to the Democratic newspaper, "the plain English of which is that the Court (meaning Judge Bond) upon reflection has found that his personal temper got the best of his judicial prerogative." The newspaper predicted that "a decision will never be pronounced." The Courier's assessment of the outcome appears to have been correct. Neither the verbatim court records nor the Sessions Index and Minute Book of the

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<sup>37</sup>The proceedings against McMaster are included verbatim in the appendices to Proceedings, pp. 799-812. The decision of the Court, however, is missing.

Criminal Court indicate the outcome of McMasters' trial.

McMasters continued as a prominent and influential member of the South Carolina Bar. His client remained at large, his case carried along on the docket from term to term.<sup>38</sup>

Judge Bond's anger with McMasters and his client, Edward T. Avery continued unabated. The judge had no sympathy or respect for an influential member of the community who jumped bail and disappeared after the government had expended so much time and effort on his trial. Mrs. Avery continued to work for the release for her husband and father of her six children. As the political climate changed and interest in enforcement of civil rights waned, she appealed to Attorney General Williams. McMasters submitted affidavits from two former Ku Klux who admitted being on the raid when Sam Sturges and Isaac the Apostle were outraged. Both men swore that Avery had no part in the attack. Williams instructed Corbin (despite the strong recommendation of the district attorney to the contrary) to allow the doctor to return to his family. When Judge Bond received the document which would have discontinued the case against Avery in April 1873, he refused to sign the closing orders of the court session until he had deliberately struck

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<sup>38</sup>Charleston Daily Courier, 8 January 1872. The Minute Book lists the trial, p. 566, but does not indicate a verdict. McMasters ran for Congress on the "Straightout" Democratic ticket in 1884. See McMasters' scrapbook in F.W. McMasters Papers, South Caroliniana Library, University of South Carolina.

through the part excepting Avery from arrest. Clearly he considered him guilty and wanted to seem him serve his term. McMasters, on the other hand, claimed that the "verdict was unrighteous & the jury which tried him a disgrace to civilization."<sup>39</sup> The opinion of the defense lawyer captured the feelings of most of the white community in South Carolina as the trials had proceeded.

Throughout the trials the two sides had displayed sharply contrasting attitudes toward the humble black people who took the witness stand and filled the jury. The presiding judge, however, found it easier to bear the ignorance and inexperience of the freedmen than the condescending attitudes and constant interruptions of the defense attorneys. Bond tired of the interminable legal haggling and complained to his wife that Reverdy Johnson had used the trials as a political showcase, but he listened with patience to the witnesses and treated the jurors with respect. His charge to the grand jury demonstrated his belief that blacks were able to exercise judgment and to assume the responsibilities placed on them by the law. He urged them to do their duty "with impartiality and fairness, but with firmness." Recommending the pattern that he followed personally, Bond counseled the grand jurors that witnesses were under unusual strain and it was absolutely

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<sup>39</sup>F.W. McMaster to G.H. Williams, 11 June 1873; Affidavit of J.P. Castor and J.J. Steele, n.d.; Corbin to G.H. Williams, 26 April 1873, all in S.C.F., S.C.

necessary to "bear with them patiently." The judge instructed the petit jurors on the law of conspiracy confident in their ability to decide intelligently.<sup>40</sup>

U.S. v. Edward T. Avery, concluded on January 2, 1872, was the final trial of the November 1871 term of the Fourth Circuit. The Ku Klux Klan cases had consumed the entire six week long court session, yet a total of only five persons had been tried in four trials. The cases tried had scarcely made a dent in the load. Some 278 enforcement cases were carried over to the next term of the Court. If the number of persons tried was small, the government had nonetheless obtained a perfect conviction record. Forty-nine guilty pleas added to the government's success rate. Attorney General Akerman wrote Corbin from Washington that he was pleased with the results of the trials: "As far as I can learn, the prosecuting lawyers have answered every reasonable expectation, and have managed the business ably." Corbin and Chamberlain had "done excellently well." When Akerman resigned his position at the end of 1871, he found it "comforting to believe that I have born some part in the exposure and destruction of that terrible conspiracy."<sup>41</sup>

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<sup>40</sup>Hugh Bond to Anna Bond, 26 November 1871, Bond Papers, Maryland Historical Society; KKK Reports, 5: 620. See for example, Proceedings, pp. 449-51.

<sup>41</sup>Returns for the Annual Report of the Attorney General, District of South Carolina, 6 January 1872, S.C.F., S.C.; Akerman to Corbin, 15 December 1871 and 1 January 1872, both in Amos T. Akerman Papers, University of Virginia.

If the government had successfully prosecuted a number of Ku Klux nightriders, the cost had been tremendous in terms of time, effort, money and constitutional goals. As determined as Judge Bond was to see justice done, he had been reluctant to accept the most constitutionally novel goals of the prosecution. Confusion remained on the two issues which the judges had certified to the Supreme Court in U.S. v. James W. Avery, the Second Amendment question and the problem of determining in federal court whether ordinary crimes had been committed in the process of denying civil rights.<sup>42</sup> Both the prosecution and defense wanted a definitive answer to the question of whether the Fourteenth Amendment secured to the freedmen the right to bear arms. The Avery case was chosen to certify to the High Court, because it involved a murder. If the Court decided that the federal courts had jurisdiction to determine whether a common law crime had been committed in order to ascertain the measure of punishment for interfering with the franchise, a Klansman could potentially be put to death for interfering with the rights of the freedmen. Many people throughout the United States doubted that the Fourteenth Amendment was meant to bring such a radical change in the federal system.<sup>43</sup> With hundreds of Klan cases pending,

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<sup>42</sup>See chapter IV. above.

<sup>43</sup>Certificate of Division is in Supreme Court Appellate Case Files, case number 6161, NA.

federal attorneys throughout the South looked to the High Court to clarify the confusion. So, too, did the opposition, certain the nation's High Court would find the Enforcement Laws exceeded constitutional authority.

Reverdy Johnson pressed for an early hearing, a goal with which Corbin and Chamberlain heartily agreed since the next Circuit Court in South Carolina was set for April, 1872. Arguments began in mid-March. But the efforts of the new Attorney General of the United States, George H. Williams, deliberately blocked a thorough review of the case.

President Grant appointed Williams Attorney General upon the Akerman's resignation at the close of 1871. Akerman was asked to resign, but the reasons are unclear. "The reasons for this step," he wrote Corbin, "I would not detail fully without saying what, perhaps, ought not to be said." Akerman took comfort in the knowledge that he had helped to break up the Klan and assured Major Merrill that his successor was "an able and experienced man" who could carry on the work "free from some of the hostilities that have obstructed me." Historians have traditionally held that Akerman was forced out of the cabinet because of his lack of popularity with the railroad magnates. William McFeely has suggested, however, that it was Akerman's devotion to the concept of equality that shortened his tenure in office: "Men from the North as well as the South

came to recognize, uneasily, that if he was not halted, his concept of equality before the law was likely to lead to total equality."<sup>44</sup>

A former Republican senator from Oregon, Akerman's successor had written the Tenure of Office Act, served on the Joint Committee of Fifteen on Reconstruction, and become one of Grant's "chief flatterers and hangers-on." For his efforts, George Williams was rewarded with a place in the cabinet even though he was considered a "third-rate lawyer." Williams' behavior casts serious doubt toward his dedication to the task of securing civil rights for the nation's black citizens. Williams insisted that the Supreme Court lacked jurisdiction in the Avery case. Two years earlier the High Court had declined to rule on a matter which involved a preliminary motion over which the Court had broad discretion.<sup>45</sup> Now, Williams insisted the Court must follow precedent. Reverdy Johnson argued against dismissal. Since the question involved the jurisdiction of the Circuit Court, he insisted, "the case cannot proceed until the question is decided." Williams replied, however, that the trial could have proceeded. The Circuit Court did not doubt its

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<sup>44</sup>Akerman to D.T. Corbin, 15 December 1871; Akerman to Lewis Merrill, 8 January 1872, both in Akerman Papers, University of Virginia; New York Times, 14 December 1871; McFeely, "Amos T. Akerman," p. 409.

<sup>45</sup>Benjamin B. Kendrick, ed. Journal of the Joint Committee of Fifteen on Reconstruction (New York: n.p., 1914: reprint, New York: Negro Universities Press, 1969), pp. 191-92; U.S. v. Rosenburgh, 7 Wall 580 (1869).

jurisdiction to try the defendants for conspiracy. The same question could have been raised later when the prosecutor offered evidence to prove murder. If the decision of the High Court, announced on March 21, 1872, pleased the new Attorney General, it proved disappointing to both sides of the constitutional issues at stake. Following precedent, the justices refused to address the issues involved in the Ku Klux Klan cases, because Avery went up on a preliminary motion over which the Circuit Court had broad discretion. The decision left the government attorneys without direction for future trials.<sup>46</sup>

The defense tried yet another devise to bring a case before the Supreme Court in Ex parte T. Jefferson Greer. After Judge Bond had left South Carolina in January 1871, defense attorney W.W. Fickling petitioned Judge Bryan for a writ of habeas corpus for Greer and two others on the grounds that they were held on authority of indictments which were unconstitutional. Bryan initially understood the defense attorney to protest his client being arrested and held without the customary procedures. By the time of the hearing, however, Greer had been indicted and was held on a bench warrant. Fickling sought the writ, he clarified, not because his client was improperly confined, but rather "on the ground that the law under which he is indicted and under

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<sup>46</sup> U.S. v. J.W. Avery, 13 Wall 251 (1872). See also Charles Fairman, Reconstruction and Reunion: 1864-88, (New York: Macmillan, 1987), 2: 211-13.

which the warrant was issued against him, is unconstitutional." To have the nation's High Court apprise the Enforcement Act, the defense sought habeas corpus relief--"habeas corpus being the only mode known to the law by which a criminal matter can be taken to the Supreme Court without a division and certificate of the Judges of the Court."<sup>47</sup>

Bryan decided to cooperate with the defense effort. Although he personally considered the law constitutional "so far as the enforcement and protection of the right of suffrage is concerned," he granted the writ. After inquiring into the cause of detention, he remanded the prisoner to custody. The defense then appealed to the Supreme Court.<sup>48</sup> Congress had provided for appeal on habeas corpus proceedings in 1867, a law which was hastily withdrawn with the McCordle Repealer in 1868.<sup>49</sup> The revocation of the statute left the Supreme Court's authority to use habeas corpus where it had been originally under the Judiciary Act of 1789. Habeas corpus could be used in conjunction with certiorari, the High Court had indicated in Ex parte Verger, and it was the combination of the two procedures which brought Ex parte Greer before the court

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<sup>47</sup>Proceedings, pp. 794-95.

<sup>48</sup>Ibid., pp. 797-98.

<sup>49</sup>14 U.S. Statutes at Large 14, 385; U.S. Statutes at Large, 15, 44.

now. Certiorari enabled the Supreme Court to review the lower court record and arguments of counsel which the justices would use to determine whether or not to grant Greer's release on habeas corpus.<sup>50</sup>

Henry Stanbery submitted a brief for petitioner which made the familiar argument that the federal courts lacked jurisdiction. Greer was indicted (under section six of the First Enforcement Act) on several counts of committing murder while denying the voting rights of a freedman. Since murder was a common law crime, only state courts were authorized to try the crime. Stanbery further challenged the entire law as unconstitutional on the grounds that it prohibited all interference with the franchise, not just that on account of race as provided by the Fifteenth Amendment.<sup>51</sup>

The government brief prepared by Solicitor General Bristow made three primary points. First it denied that the Court had jurisdiction. Habeas corpus had never been used to discharge a prisoner held on indictment by a U.S. Circuit Court and should not be so used now. The brief defended Congressional authority to pass the Enforcement Act under the Fourteenth and Fifteenth Amendments. The framers

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<sup>50</sup>Fairman, Reconstruction and Reunion, 1: 581-83; 2: 213-14.

<sup>51</sup>Ibid., 2: 214-15. The High Court would accept this argument when Stanbery made it again in U.S. v. Reese, 92 U.S. 214 (1876).

intended the right to act "on the people individually," not only incases of state action. Finally the government claimed that when the states deprived the freedmen of their rights they had failed to provide a republican form of government, thus violating the guarantee clause and authorizing Congress to act.<sup>52</sup> Since the law was clearly constitutional, the Supreme Court should not release Greer on habeas corpus.

A divided court refused Greer's petition for reasons which are unclear. A vote to deny the writ could mean that the justice thought the court lacked jurisdiction to accept a habeas corpus appeal, that the justice considered the law constitutional--in which case the prisoner should remain in custody, or even that the justice deemed it improper to preempt the circuit court's authority to rule on the Enforcement Act.<sup>53</sup> Whatever the individual reasons for denying relief may have been, the Court's collective refusal to address the issues in Greer, like the insistence on following precedent in Avery, left both sides without clear directions for future trials. The government attorneys had developed a successful method of prosecution, but the meaning and scope of the Reconstruction Amendments and the Enforcement Acts were still unclear.

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<sup>52</sup>Ibid., 2: 216-17.

<sup>53</sup>Ibid., pp. 217-20.

Preparing for the next round of trials, Corbin warned both Akerman and his successor George Williams that the successful prosecution of a few Klan members had not yet changed the minds and hearts of white South Carolinians. The large number of cases pending represented primarily York County. Other counties in upcountry South Carolina "when properly worked up" would yield a similar "catalogue of crime." Corbin was dissatisfied with the government's progress in arresting Klan members outside York County. Things were quiet, but it was understood among the Klansmen that "when the storm blew over, and before the next election they were to be allowed to resume operations." Because "nothing creditable [had] been done toward getting at the leading responsible men in the Ku Klux organization," it was mandatory that the government should not seem to vacillate. Ku Klux would "naturally construe their immunity from prosecution and punishment into license to do the like again." Above all the government should continue its efforts to capture leading Klan members who had escaped when Habeas Corpus was suspended.<sup>54</sup>

Capturing the criminals proved an elusive task. Some of the Klansmen were able to remain in the vicinity, trusting their family and neighbors to warn them when the federal troops approached. Hundreds of other nightriders

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<sup>54</sup>Corbin to A.T. Akerman, 3 November 1871, Corbin to G. H. Williams, 20 February 1871, Corbin to G.H. Williams, 22 November 1872, all in S.C.F., S.C.

had escaped to parts unknown when President Grant suspended habeas corpus. Extradition procedures proved difficult. Corbin complained to the attorney general of "bad faith" on the part of a marshal in Arkansas who refused to serve warrants on several fugitive Klan chiefs who were "covered all over with blood." It was disheartening to the Carolina carpetbagger to locate the criminals and still not be able to get his hands on them.<sup>55</sup>

Government investigators traced two of the most wanted Klan leaders, Major James W. Avery and Dr. J. Rufus Bratton, to London, Ontario. Both men were indicted on several counts of conspiracy and wanted by the federal government for the murder of black militia captain Jim Williams. Major Avery had helped to organize the York County Klan in 1868, and was allegedly the top man in all of York County. Avery had ordered the raid and murder of Williams. Rufus Bratton had commanded the murder party. His brother John Bratton "entertained and fed the Klans" in his plantation yard immediately after the grisly deed was accomplished.<sup>56</sup>

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<sup>55</sup>W.H. Brown to R.M. Wallace, 13 April 1872, S.C.F., S.C.; Corbin to G.H. Williams, 1 June 1872, S.C.F., S.C.

<sup>56</sup>Corbin to A.T. Akerman, 3 December 1871. Both Avery and Bratton were indicted in the case which was certified to the Supreme Court on a division of opinion, U.S. v. James W. Avery, et al, 13 Wall 251 (1872). On the government's efforts to trace Avery and Bratton see Lewis Merrill to A.T. Akerman, 8 December 1871, Lewis Merrill to Adjutant General, 11 July 1872, S.C.F., S.C.

The United States attempted to arrange extradition for the South Carolinians who had fled to Canada. The Canadian Government, however, refused to cooperate. Just as the Canadians had provided refuge for the thousands of blacks who escaped across the border following the Fugitive Slave Law of 1851, so now they granted political asylum for the Klansmen who fled from the federal government. To the Canadians, the blacks were not fugitives from justice, but fugitives from labor. Since Great Britain had abolished slavery throughout the empire in 1833, Canadians did not recognize the peculiar institution. Runaway slaves were free men in Canada. Now the Canadians refused to recognize the runaway Klansmen as fugitives from justice covered by treaty. Instead the Canadians considered the Klansmen political refugees worthy of protection. They, too were free men in Canada.<sup>57</sup>

When extradition failed, the United States sent secret service agents to bring these leaders to justice. The Secret Service kidnapped Dr. Bratton near his lodging in

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<sup>57</sup>On the migration of fugitive slaves to Canada see, for example, Jonathan Katz, Resistance at Christiana: The Fugitive Slave Rebellion, Christiana, Pennsylvania, September 11, 1851 (New York: Thomas Y. Crowell, 1974), pp. 262-63 and passim; Philip S. Foner, History of Black Americans from the Compromise of 1850 to the End of the Civil War (Westport, Conn.: Greenwood, 1983), pp. 150-58; Fred Landon, "The Negro Migration to Canada after the Passing of the Fugitive Slave Act," Journal of Negro History (January 1920): 22-36. For information on the Canadian perception of Bratton's case see Dr. Bratton's Case, pp. 3-18.

London and forcibly returned him to South Carolina. The Canadian government sharply protested, however, and the United States returned the suspect. Evidence indicates that the agents kidnapped the wrong man, having mistaken Bratton for Avery. They arrested Bratton on a warrant for Major J.W. Avery. The United States would have been delighted to keep him, however, as both men were among the most wanted suspects.<sup>58</sup> The prosecution intended to focus more intently on Klan leaders and those who had committed the most heinous crimes in the upcoming session of the Fourth Circuit Court.

The April 1872 Circuit Court Session in Charleston opened amid great controversy. Six weeks of testimony exposing the heinous nature of Klan atrocities in the previous court session had failed to convince the white community that the trials were anything more than a travesty of justice. "There can be no question," The Charleston Courier had announced at the close of the November term, "that the Councils of Safety called elsewhere Ku Klux, were not political organizations, had no political purpose, no

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<sup>58</sup>Louis F. Post, "A 'Carpetbagger' in South Carolina," Journal of Negro History 10 (January 1925): 60-61; Fred Landon, "The Kidnapping of Dr. Rufus Bratton," Journal of Negro History 10 (July 1925): 330-33; Dr. Bratton's Case, pp. 3, 18. Bratton remained in Canada for several years as a practicing physician. His wife and friends in South Carolina continued during his absence to work for his freedom. He was eventually pardoned by President Rutherford Hayes whereupon he returned to South Carolina. J.R. Bratton to Dear Brother, 20 April 1875; Mrs. J.R.Bratton to D.T. Corbin, 25 August 1873, both in Bratton Family Papers, South Caroliniana Library, University of South Carolina.

hostility either to the Government or Constitution of the United States, or any intention to interfere with the right of suffrage." The government had been able to obtain convictions, according to the paper, only because of "a packed jury and witnesses willing to swear to anything." The court was worse than a star chamber; the "old court law maxim that every man is to be regarded as innocent until his guilt be proven is reversed."<sup>59</sup>

Now the Charleston paper scornfully announced the reopening of the circuit court: "The so-called Ku Klux Crusade has been reopened. The days of the Star Chamber have been renewed. . . . In this state there has been inaugurated a reign of terror, which dethrones the Constitution, and puts an end to all law and liberty." The paper was particularly indignant that the accused had been incarcerated without the usual procedural niceties when the Constitution "declares the right of every citizen to be secure" in his home. White citizens complained privately of "packed juries" and predicted "no chance of acquittal" for any of those who were being persecuted so unmercifully by the federal government. Black citizens, meanwhile crowded into the city, some to testify, others to attend the court sessions as spectators "taking every available inch of sitting and standing room." The crowd was so great that the

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<sup>59</sup>Charleston Daily Courier, 6 January 1872, 8 January 1872, and 9 January 1872.

ceiling underneath the courtroom "cracked in several places and showed signs of falling in." The freedmen looked to the federal government to protect their right to be secure in their persons and homes.<sup>60</sup>

Several days of the court session passed before any Klansman was actually put to trial. "They all plead guilty," Judge Bond wrote his wife, "if you only won't hang them." The Judge hoped the trend would continue, thus cutting short the time before he could return home. The Klansmen had good reason to plead guilty. The government, represented this time by Major Merrill, District Attorney Corbin, and his assistants William Stone, and William E. Earle, offered to drop the murder charges in a large number of cases in exchange for guilty pleas. Since the Supreme Court had not yet ruled on the constitutionality of inquiring whether common law crimes had been committed in the process of interfering with the franchise, the deal was too good for many of the nightriders to refuse.<sup>61</sup> The prosecution was determined to try Klansmen involved in murder during this second round of trials.

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<sup>60</sup> Charleston Daily Courier, 6 April 1872, 4 April 1872, and 12 April 1872; G.I.C. to William Porcher Miles, 4 April 1872, William Porcher Miles Papers, Southern Historical Collection, University of North Carolina.

<sup>61</sup>Hugh Bond to Anna Bond, 11 April 1872, and 14 April 1872, Bond Papers, Maryland Historical Society; Charleston Daily Courier, 11 April 1872, 12 April 1872, 13 April 1872. See also Criminal Docket, United States Circuit Court for South Carolina, April Term 1872, in S.C.F., S.C.

Doubtless disappointed by the Supreme Court's refusal to decide the issues, District Attorney Corbin during the South Carolina Klan trials in April 1872 resurrected both the question of trying common law crimes in federal court and the Second Amendment charge which he hoped would protect the civil rights of black citizens independent of their political rights. He brought indictments deliberately formed to test the issues on which Judge Bond and Judge Bryan had previously disagreed. The prosecution, local defense attorneys--Stanbery and Johnson did not attend this session--and judges all agreed to accept the charges in order to send up a case to the Supreme Court.<sup>62</sup> Elijah Ross Sapaugh was chosen from among the many who were indicted for the murder of freedman Thomas Roundtree.

The murder of Thomas Roundtree was a particularly heinous affair. Approximately eighty nightriders raided his home expecting to find some guns which were reportedly stored on the property. When they broke into the house, Roundtree shot into the crowd from a loft, injuring Sapaugh. Roundtree then dropped from the loft to the outside attempting to escape. Someone yelled that Sapaugh had been shot. For his effrontery in defending himself, Roundtree

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<sup>62</sup>Although there is no verbatim report of the Klan Trials after the November 1871 term, the Charleston Courier (despite its partisan editorial comment) provided extensive coverage. Corbin had persuaded Attorney General Williams to hire a stenographer, but the man chosen was "incapacitated since here from drink," and Corbin had to fire him. See Corbin to J.Falls, 18 April 1872, S.C.F., S.C.

received the full force of Klan fury. A witness related that he had counted some thirty-five bullet holes in the freedman. In the event that was not enough to kill him, Henry Sapaugh, brother of the accused, had drawn his knife and slit Roundtree's throat from ear to ear.<sup>63</sup>

Elijah Ross Sapaugh was tried on a six count indictment carefully constructed to test the extent of federal power. Two counts charged murder committed in the process of denying Thomas Roundtree's political rights, one by shooting, the other by slitting Roundtree's throat. Another charged conspiracy against Roundtree's Second Amendment right to keep and bear arms. Other counts charged conspiracy against Roundtree for voting previously and planning to vote in the future. Three other Klan cases tried at this session of the circuit court similarly charged murder "against the peace and dignity of South Carolina" in a deliberate attempt to test the constitutionality of the seventh section of the Enforcement Act of 1870. Judge Bond insisted, however, that the defendants were not being tried for murder. They were being tried for conspiracy "and that in the execution of that conspiracy a murder was committed."<sup>64</sup>

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<sup>63</sup>Proceedings, pp. 505-7.

<sup>64</sup>Charleston Daily Courier, 20 April 1872 and 26 April 1872; Criminal Case Records, S.C., roll number 30, Federal Records Center, East Point, Georgia; U.S. v. Elijah Ross Sapaugh, Supreme Court Appellate Case Files, number 6482, National Archives. The other murder cases were: U.S. v.

The trial proceeded quickly, requiring only one day. In the Sapaugh case, unlike the Klan cases in the previous session of the court, the jury was balanced racially--six blacks and six whites. Still the Charleston paper complained of fixed juries. When the prosecuting attorneys questioned white jurors carefully to ascertain that they had not been connected with the Klan in any way, the newspaper labeled the process "pumping." The District Attorney, according to the Courier, ordered "every white man of respectable looks to stand aside, whom he suspected of being other than Radicals." Once the jury was impaneled, Judge Bond allowed the defense attorney, J.F. Ficken, to enter a plea that the Circuit Court lacked jurisdiction, because murder is a common law offense. Then the trial proceeded. First the prosecution proved the existence of the Klan as in all the previous cases. Next the government demonstrated the Klan's political nature. The bulk of the testimony, however, concentrated on the murder of Roundtree and the issue of taking the guns. The defense attorney deplored the crime against Roundtree, "as foul and deliberate a murder as he had ever heard of," but insisted that Sapaugh was not the one who should be tried. He was only one of many in the

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Wesley Smith and Leander Spencer, mistrial, murder charge dropped for a guilty plea on conspiracy counts; U.S. v. Thomas Zimmerman, not guilty; U.S. v. Robert Riggins, guilty of conspiracy, not guilty of murder. Criminal Case Docket, District of South Carolina, April Term 1872, S.C.F., S.C. See also Charleston Daily Courier, 16 April 1872, 17 April 1872, 18 April 1872; 19 April 1872; 27 April 1872.

crowd; there was no evidence "to show that the prisoner took part in the murder." Indeed, according to the defense, there was no evidence that the murder was a result of conspiracy.<sup>65</sup>

Corbin's closing arguments indicated he was willing to apply the death penalty in Enforcement Law cases. He felt sympathy for Sapaugh, he said, but he could not shrink from his duty. He felt even more for the one who had been so viciously murdered. The demands of society required that the guilty must pay. He emphasized primarily the facts of the murder. "If the facts alleged in the indictment had been proven," he insisted, it was the responsibility of the jury to "bring in a verdict of guilty, and leave the law to fix upon the prisoner the punishment that he had incurred." The law, as Corbin had previously stated, "says that when men commit murder they shall die, and we have no right to complain of it."<sup>66</sup> Thus the trial of Elijah Ross Sapaugh highlighted the objections which the defense had made throughout the Klan trials. Using the state penalties for common law crimes could result in people being put to death for violating the political and civil rights of their fellow citizens. Such a dramatic departure from traditional state-based federalism was too much to concede. And the law of conspiracy made plain that anyone involved in the Ku Klux

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<sup>65</sup>Ibid., 20 April 1872.

<sup>66</sup>Ibid., 20 April 1872.

organization was guilty of all the crimes committed to carry out its purposes.

Although Judge Bond had stated that the defendant was being tried for conspiracy rather than murder, he carefully defined the crime of murder and the nature of malice which constituted the felony. In order to find the prisoner guilty, he said, the jury must first find that a conspiracy existed and that the people involved in it "had in view the commission of the felony." In other words, the crime must be premeditated. Then the jury must determine that "in carrying out the conspiracy the felony was actually committed." It was not necessary for a conspirator "actually to strike the blow" to be guilty. Rather "all persons were principals who go out for the purpose of doing an unlawful act, and who are ready and willing to assist in it." Consent was the key. The jury apparently had no compunction about finding the defendant guilty of charges involving murder. They returned a guilty verdict in only one hour, recommending Sapaugh to the mercy of the court. Defense attorney John F. Ficken quickly moved in arrest of judgment.<sup>67</sup>

Despite the complaints of "packed juries" and witnesses "willing to swear to anything," the government did not achieve the success rate in the April 1872 session in

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<sup>67</sup>Ibid.; Criminal Docket, United States Circuit Court for South Carolina, April Term 1872, S.C.F., S.C.

Charleston that it had enjoyed in the previous session in Columbia. Eighteen persons were tried and convicted for conspiracy; of this number two cases included murder charges. A third murder case ended in acquittal; another resulted in a mistrial. The severity of the charges perhaps contributed to the jury's reluctance to convict in these cases, although the jury in the Sapaugh case certainly demonstrated no hesitation. Corbin announced he was satisfied with the verdict, however, as the testimony had conflicted.<sup>68</sup>

Corbin was more determined than either the Attorney General of the United States or Judge Bond to continue to prosecute vigorously. He requested a special session of the court in August 1872. "The K.K.'s are becoming very much emboldened" in the upcountry, he had reported to Williams. There was once again a "general feeling of alarm among the colored people," especially those who had testified against their neighbors. A strong federal presence was necessary to protect the freedmen. Corbin recognized, however, that the court system as it stood was "utterly inadequate" to handle the press of business. Corbin recommended that those "worst and leading characters" who had been instrumental in committing the "most shocking murders" be held for trial. Those suspected of lesser offenses could remain at home on

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<sup>68</sup>Charleston Daily Courier, 6 January 1872; Corbin to George Williams, 15 December 1872, S.C.F., S.C. See footnote 56 above.

their own recognizance subject to appear when called. Their cases would be continued on the docket from term to term to encourage their good behavior. Major Merrill reiterated Corbin's plea for a court session in August. "Affairs are getting into a very bad condition by reason of hopes excited by refusal of Congress to extend suspension of Habeas Corpus," he reported to the Adjutant General. If there was any "relaxation or appearance of it," he predicted, "there will most certainly be renewal of serious trouble before the election." Thus it was "vital to the interests of peace" that the government continue to prosecute vigorously.<sup>69</sup>

Judge Bond declined to come for a special session. There are a great many reasons why somebody should come," he wrote his wife, "but I don't want to. . . . The South in August is not particularly agreeable & trying Ku Klux Less so." Besides it was too expensive. "I have done enough to suppress this revolt," he continued, "and I can do no more." Thus the Judge who had earlier pledged "if all the defence [sic] they have is my want of patience I shall see that it don't avail" had run out of patience for trying the Klan.<sup>70</sup>

A few more Klan cases were heard during the November 1872 Session of the Circuit Court in Columbia, but the

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<sup>69</sup>Corbin to George Williams, 22 July 1872, and 22 November 1872: Merrill to Adjutant General, 11 July 1872, all in S.C.F., S.C.

<sup>70</sup>Hugh Bond to Anna Bond, 18 April 1872, and 18 December 1871, both in Bond Papers, Maryland Historical Society.

government had tired of the effort. Clearing the docket had become more important than continuing the cases to persuade the accused to conduct themselves as good citizens. Corbin began at this session to nolle pros all but the most serious cases. Some 1,188 Enforcement Law Cases in South Carolina remained pending at the end of 1872, a number which would have overwhelmed the federal courts for many years to come.<sup>71</sup>

The Sapaugh case was certified to the Supreme Court on a division of opinion on the court's "jurisdiction to find whether the crime of murder has been committed . . . in order to ascertain the measure of punishment to be affixed." Ficken unfortunately failed to include the Second Amendment count in his motion, so the question did not go up to the High Court a second time.<sup>72</sup> It is clear, nonetheless, that the bench upheld the count only to test the issue, because no later indictments for a Ku Klux Klan case tried in South Carolina charged a conspiracy against the right to keep and bear arms.

The Supreme Court never heard the Sapaugh case despite the importance of the constitutional question. Reverdy Johnson expected to present the case for the defense;

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<sup>71</sup>Corbin to George Williams, 15 December 1872, S.C.F., S.C.

<sup>72</sup>Motion in Arrest of Judgment in Criminal Case Records, S.C., file number 30, Federal Records Center, Eastpoint, GA.

government attorneys and judges in South Carolina and throughout the South agreed on the need for a decision. It was Attorney General Williams once again who sabotaged efforts to obtain a ruling. Williams directed Corbin to enter a nolle prosequi to remove the case from the Supreme Court docket. His reasons are unclear. He wanted the case terminated, he wrote, "not for the sake of Sapaugh, but for the sake of the public good." Despite his personal desire to have the constitutional question resolved, Corbin obviously followed the order of his superior. The local defense attorney protested "on general principles," but the murder count was dropped nonetheless.<sup>73</sup>

Thus ended the great South Carolina Ku Klux Klan trials--"not with a bang but a whimper." Thanks to the efforts of the District Attorney the Supreme Court did not have the opportunity to rule on the issue of charging common law crimes in conjunction with the abuse of voting rights. The federal government's most sustained effort to provide positive civil and political rights for black citizens ended with no substantial constitutional gains. The goal of bringing all black citizens of South Carolina, women as well as men, under the protection of the federal government through the Second Amendment died with the Sapaugh Case;

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<sup>73</sup>Williams to Corbin, 26 September 1874, and 29 October 1874, Instruction Book E, RG 60, National Archives. Sapaugh was sentenced on the first count of the indictment to pay \$100.00 fine and serve one year in the Albany penitentiary. Corbin to Williams, 16 December 1874, S.C.F., S.C.

confusion remained on the incorporation issue. Federal attorneys in South Carolina made no further attempts to attach ordinary crimes to voting rights violations.

On the positive side, the prosecuting attorneys won numerous convictions and confessions restoring--for the time being--an uneasy peace. But the attempt to punish the leading citizens who had spearheaded the Ku Klux Klan was, by and large, also a failure. The most wanted Klansmen were those who had the wherewithal to take off for parts unknown. Thus the brunt of the government's prosecution efforts fell on those who were guilty of lesser crimes. If the letter of the law made clear that all the people involved in a conspiracy are responsible for all its deeds, the sentencing disparities nonetheless would indicate that Judge Bond recognized the difference between the educated and influential members accustomed to dominating society and the reluctant nightriders who followed them into the Ku Klux Klan.

## CHAPTER 6 SENTENCING AND THE END OF RECONSTRUCTION

The great South Carolina Ku Klux Klan trials of 1871 and 1872 represent the most sustained effort of the federal government to enforce civil and political rights for its black citizens. The executive and judicial branches set out hand-in-hand to implement the tough new laws passed by Congress to safeguard the rights of the freedmen. "I am contemplating a sort of pronouncement to the Grand Jury," Judge Bond had written his wife Anna before the trials began, "which will indicate to these night shirited scoundrels that they have now engaged in a war with the U.S. Courts & that I don't mean to be whipped."<sup>1</sup> In the final analysis, however, Judge Bond was whipped as were all the other federal officials who fought for justice and equality. They were defeated by Southern intransigence which refused to yield even when all the forces of the national government were arrayed against it. White South Carolinians had insisted in 1868 that they would "never quietly submit to negro rule" but would "keep up this contest until we have regained the heritage of political control handed down to us

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<sup>1</sup>Hugh Bond to Anna Bond, 14 June 1871, Bond Papers, Maryland Historical Society.

by honored ancestry."<sup>2</sup> The fight for justice and equality was defeated also by an administration which lost interest in its colored constituents and tired of dealing with the "annual autumnal outbursts" of violence. And it was defeated by a constitutional vision which failed to recognize that the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution could have effected a nationalization of government powers broad enough to establish a "Second American Constitution."<sup>3</sup>

The federal government's entire prosecution effort was replete with paradox. The Justice Department had ordered the federal attorneys to focus on prosecuting those Klan members who had status and influence in the community: "The higher the social standing and character of the convicted party, the more important is a vigorous prosecution and prompt execution of judgment." But the leaders had fled the upcountry "like rats from a burning house, excepting a few old and infirm men."<sup>4</sup>

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<sup>2</sup>"Objections to the New Constitution of South Carolina," in Walter L. Fleming, ed., Documentary History of Reconstruction, 2 vols. (Cleveland: Arthur H. Clark, 1906-07) 1: 456.

<sup>3</sup>On this point see John P. Frank and Robert J. Munro, "The Original Understanding of "Equal Protection of the Laws,'" Columbia Law Review 50 (February 1950): 131-69.

<sup>4</sup>B.H. Bristow to D.H. Starbuck, 2 October 1871, Instruction Book B, RG 60, NA; Charleston Daily Courier, 24 October 1871, quoting New York Sun, n.d.

That left their followers, many of them reluctant nightriders, to bear the brunt of federal enforcement efforts. With some important exceptions, the men who stood trial, confessed, or pleaded guilty were poor, young, illiterate, unimportant, and guilty of lesser offenses. They were willing to supply information about the Klan leaders in hopes it would secure peace and order in their county. These Klansmen thought if unfair that they should be "severely punished while the leaders are suffered to escape." At least one of them, however, confessed his willingness to "suffer an imprisonment if afterward he might be allowed to cultivate his farm in quietness with neither Ku Klux nor soldiers to trouble him." These were men, according to a Northern newspaper correspondent, "whose condition of social subordination is unknown" in the North: "For generations they have been led by the 'gentlemen' of their section, and have never been used to consider political acts from a moral stand-point, or think of a personal responsibility in such matters."<sup>5</sup>

The same issues troubled Judge Bond as he examined the Klansmen who made guilty pleas. Again and again the men who came before the Court to make their statements testified that they had joined the Klan out of fear. "There were two chances for me;" William Robbins recollects, "one

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<sup>5</sup>New York Times, 30 October 1871, quoting Columbia [S.C.] Phoenix, 26 October 1871.

was to join the order; the other was to be abused by them." W.P. Burnett agreed, "they pushed the poor people into it, and made them go . . . they came to my house and told me if I didn't I'd have to pay five dollars and take fifty lashes." When Thomas J. Price similarly claimed that he had "joined the Klan because I thought I was obliged to," Judge Bond noted that there "ought to be another proclamation of emancipation"--one to free the poor whites of the South from their more educated and influential neighbors.<sup>6</sup>

These poor, ignorant, unlettered nightriders lacked the manliness and self sufficiency to defy the wishes of their neighbors. "The reason I joined the order," John Moore testified, "was, I suppose, because I hadn't sense to do any better; nobody that know'd any better didn't tell me." William Ramsey told the same tale: "We did not unite and resist them because we did not have sense enough; but I know a good many didn't join voluntarily; it seems to me that men who had good learning and knowledge ought to have teached us better." District Attorney Corbin agreed. Responsibility for the Klan's outrages, he said, rested on the Klan leaders, many of them men of property, who had "led and controlled these others." The leaders had fled the country, leaving their reluctant followers to take their punishment. Although he thought that no member of the conspiracy should

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<sup>6</sup>Confessions and sentences are in Proceedings, pp. 764-791; quotations on pp. 772, 773, 775, 799.

be held guiltless, Corbin desired a "wise and merciful discrimination . . . in favor of those who have been led, seduced, or forced into an organization guilty of such inhuman atrocities."<sup>7</sup>

Judge Bond grappled with these issues as he sentenced the Klansmen who pleaded guilty. He recognized that most of these men had been "brought up in the most deplorable ignorance." It was their custom to look to men of substance and education for guidance. Yet those who "establish and control public opinion" were themselves "participants in the conspiracy." The judge insisted, nonetheless, that even the reluctant were responsible for their crimes. The facts may "palliate in some degree" the offenses committed, but they "cannot justify you." Bond sentenced the Klansmen so "that you may learn that no amount of threats or fear of punishment will justify a man in unprovoked violence to another." The Ku Klux Klan and the laws of the United States cannot exist together, Bond continued, "and it only needs a little manliness and courage, on the part of you ignorant dupes of designing men, to give supremacy to the law."<sup>8</sup>

Judge Bond was firm but fair in determining the punishment for the Klansmen. Although the law of conspiracy deemed each participant guilty for all the crimes committed

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<sup>7</sup>Ibid., pp. 771, 785, 788.

<sup>8</sup>Ibid., pp. 789-90.

in pursuance of the conspiracy, the judges clearly considered some of the criminals more guilty than others. Sentences ranged from one month and a fine of ten dollars to ten years and two thousand dollars.<sup>9</sup> This wide disparity in sentencing reflected the crimes actually committed by the defendant, the amount of repentance displayed, the social class standing and potential to influence the community, and the amount of time already spent in jail. For those who confessed, many of whom had "staid with the horses" ignorant of the atrocities that were being committed, Bond generally set a light sentence between three and eighteen months, and a fine of fifty to one hundred dollars, depending upon the number of raids in which the guilty party had participated.<sup>10</sup>

Judge Bond, assisted by Judge Bryan, tempered justice with mercy as he determined the sentences for the individual Klansmen. In the case of James Wall who could read and write and had the advantage of having been out of the state of South Carolina during the War and thus "should have had better sense than this," the judges agreed on a sentence of

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<sup>9</sup>Five years and \$1,000 was the maximum sentence imposed during the first group of Klan trials, the November 1871 term of the Circuit Court. Eight and ten year sentences were set during the April 1872 session when the government attorneys concentrated on prosecuting Klansmen who were implicated in murders. See Proceedings, pp. 764-91; Minute Book, United States Circuit Court for South Carolina, April Term 1872, pp. 84-85, 87-88.

<sup>10</sup>Sentences for those who confessed are in Proceedings, pp. 764-87.

three months. The sentence should have been eighteen months, Bond said, but he wanted to "allow you to put in your crop next Spring." The judges acted out of consideration for Wall's wife and children, even though "you had no consideration" for the families of others. "The Court has been very much puzzled to reconcile justice with humanity," Judge Bryan announced: "It is an extreme exercise of mercy to you that they announce this judgment."<sup>11</sup>

Bond threw the book at Squire Samuel G. Brown, a white haired gentleman who came to court to confess. Brown was a man of education and influence in York County. He had been a magistrate until 1868. It was from Brown that the prosecution had obtained the copy of the Ku Klux Klan constitution and by-laws which was used to prove the existence of the conspiracy and its political purposes. Brown's connection with the Klan is clouded. He claimed that he had attended meetings only to dissuade the younger men from "committing excesses, but that he had never been on a raid." He had obtained the constitution in 1868, he said, out of curiosity merely to determine for himself the purpose of the organization. His sons, Chambers Brown and Amos Alonzo Brown, were both Klan leaders, one of them a chief. The government claimed that the elder Brown was also a prominent member. The New York Tribune reported that

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<sup>11</sup>Ibid., pp. 786-87.

although the old man appeared "genial and benevolent," the case against him was "quite black." Neither the Tribune nor the Ku Klux Klan Reports, however, clarify the exact nature of Brown's alleged crime. During the course of the Klan trials, however, witnesses had testified that Brown attended several meetings and even that he was the person who had initiated them into the order. No one had seen Brown on a raid; the implication was that he was a power behind the order.<sup>12</sup>

Judge Bond was determined that Squire Brown make a "candid statement of all your connection with this Klan, and all the other people in your community who have connection with it" if there was to be any mitigation of his sentence. Had Brown chosen to make full confession, the evidence seems to indicate that he would have received a lighter sentence. Bond allowed the Squire extra time to prepare affidavits to support his case. The documents were a disappointment, however, and Brown refused to talk. He proclaimed his own

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<sup>12</sup>Ibid., pp. 767-8; New York Tribune, 23 November 1871. A clipping from the Paris [Texas] News, 6 September 1933, entitled "Backward Glances" implicated Brown as a Klan leader. Worth Duncan related that Brown asked him to deliver a Winchester cartridge to J. Banks Lyle, who was allegedly the highest Klan official in South Carolina. Within a few days the Battle of Turkey Creek Bridge was fought between the Klan and some Negro soldiers. Lyle left South Carolina to avoid prosecution and lived for many years in Texas where he ran a school. He had run a classical school in South Carolina before the Civil War. Clipping in J. Banks Lyle Papers, South Caroliniana Library, University of South Carolina.

innocence, and refused to implicate any other Klan members.<sup>13</sup>

Because Brown refused to cooperate, he received the full force of the Judge's wrath. Brown was an educated man, "advanced in years," from whom those "who were young and ignorant had a right to look . . . for direction and advice." He had used his influence in favor of the Klan. Bond was especially perturbed that a former magistrate, "a man who had been appointed to protect the innocent and the helpless," had instead taken a "prominent part" in the Ku Klux Klan. He had violated the trust put in him by the state when he refused to protect the local freedmen. Bond professed to allow Brown the benefit of one instance of a "return to manhood" when he claimed to have prevented a raid the Ku Klux had planned. Whatever advantage that attempt to stop the violence gave the old man, he still received a stiff sentence--five years in prison and a \$1,000 fine. "You evidently don't propose to tell all you know," Bond stated impatiently, "and I don't, therefore, propose to hear you further."<sup>14</sup> Brown's punishment was as harsh as that received by any of the Klansmen who had actually stood trial during the November 1871 court session.

Randolph Abbott Shotwell, an embittered North Carolina journalist sentenced to Albany Prison for Ku Klux

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<sup>13</sup>Proceedings, pp. 767-8.

<sup>14</sup>Ibid., p. 768.

offenses, reported in his prison journal that the government accused Brown falsely then cheated him out of the deal he made in a plea bargain. Shotwell saw things, obviously, from a Democratic point of view; in his estimation the old man had "no more business here than Judge Bond who sent" him. Brown had been dragged unmercifully from the comforts of home by a detachment of cavalry, Shotwell said, locked up in jail for weeks, then released on \$5,000 bond to appear in court in Columbia. Recognizing that he stood no chance of a fair trial when the government "wanted victims," Brown's lawyers urged him to plead guilty. According to Shotwell, Judge Bond had indicated that those who made confession and pleaded guilty would receive nominal sentences while those who demanded a trial would be punished more severely. Major Merrill was reported to have promised Brown he would be at home within a few weeks. "Such a pressure was hard to resist," Shotwell noted; Brown yielded.<sup>15</sup>

Whether or not the government broke faith in Squire Brown's case is difficult to determine. Shotwell insisted that the evidence against Brown was "utterly unworthy of belief." Thus the "villains had designed" an evil plot to put Brown behind bars at hard labor. If there was a deal which depended on Brown's full confession and disclosure of all the details he knew concerning the Klan, he clearly had

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<sup>15</sup> Randolph Abbott Shotwell, The Papers of Randolph Abbott Shotwell, ed. J. G. de Rouhac Hamilton (Raleigh: North Carolina Historical Commission, 1936), 3: 326-9.

not fulfilled his part of the bargain. Even if it was true that he had attended only the one Klan meeting as he alleged in his affidavit, he obviously had not told all he knew. But Judge Bond was definitely harder on Brown than on the others who made guilty pleas, because of Brown's position in the community and because he had formerly held a position of trust as a magistrate.<sup>16</sup> The Judge clearly expected those in positions of influence in the South's social structure to exercise their power in a manner to benefit the community. When they failed to earn the trust of the people beneath them, they should expect to pay a higher price for their error.

Public opinion, North and South, condemned Brown's sentence as excessive. South Carolinians wrote their friends in other states who made appeals in Brown's behalf. The abolitionist Gerrit Smith visited the Ku Klux prisoners at Albany and recommended clemency in the case of Brown who was reported to be in poor health. Even the governor of New York and his wife traveled to the prison to investigate Brown's condition. Friends and family kept up a steady barrage of mail to the President and Attorney General in hopes of obtaining a pardon. The federal officials refused to yield to the pressure, however, evidently convinced there

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<sup>16</sup>Ibid.; Proceedings, pp. 767-8.

was a valid reason why Judge Bond had imposed so stiff a sentence.<sup>17</sup>

As he listened to confessions and set the punishment for each of the Klansmen, Judge Bond wrestled with what he considered to be a serious moral defect among Southern whites. As serious as the crimes committed, in the Judge's estimation, was the lack among those who had confessed "of any sense or feeling, that you have done anything very wrong in your confessed participation in outrages which are unexampled outside of the Indian territory." The humblest men in the other sections of the United States, Bond insisted, would have been wounded in their spirits by participation in the Ku Klux outrages. In the South, however, there was not "the slightest idea of, or respect for, the sacredness of the human person." Grasping for "some features of humanity" in the confessed Klansmen, Bond recognized that the South's peculiar institution was responsible for the lack of moral outrage.<sup>18</sup>

Slavery and racial oppression, according to Judge Bond, had caused a sickness which pervaded the entire social structure of South Carolina. Poor whites deferred to people with wealth and education, the same individuals from whom

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<sup>17</sup> Shotwell, Papers, pp. 248-9, 326-32, 349-50, 384. Shotwell reported that Brown's Congressman, A.S. Wallace had suggested that Brown should be released only on the condition that he reveal the whereabouts of his two sons in exile and arrange for them to exchange places with him.

<sup>18</sup> Proceedings, pp. 789-90.

they had learned to despise blacks as inferior creatures. The "whipping post was a standing institution" in South Carolina; "to see blacks flagellated was no unusual occurrence." The prevalence of violence had desensitized whites long before emancipation. Because whites had no sense of the sacredness of the black man's life, they had ceased to respect themselves. Thus, the white man had been enslaved along with the black.<sup>19</sup>

Judge Bond deplored the lack of Christian principles he found in South Carolina. "If anyone wants to see a reason for the war, why it ought to have occurred & why our Heavenly Father made it result the way he did," he wrote his wife from South Carolina, "he has only to come here. . . . I do not believe that any province in China has less to do with Christian civilization than many parts of this state." Bond could not understand why the local preachers had not spoken out against the Klan. Over and over again during the course of the trials he asked the witnesses whether the white ministers of the gospel had opposed the Klan. Invariably he found they had not. People generally went to church in the upcountry, however, and the members of the churches "pretty much" all belonged to the Klan. In Bond's mind, it would take a combination of genuine Christian

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<sup>19</sup>Ibid., pp. 789-91; for a discussion of the role of dehumanization of the victim in fostering violence see Herbert C. Kelman, "Violence Without Moral Restraint," in Varieties of Psycho History, ed. George M. Kren and Leon H. Rapporport (New York: Springer, 1976), pp. 282-314.

concern and Republican Party principles to complete the Reconstruction process; the freedmen would never achieve equal rights until "we have added to the power of our political truth the energy of religious fervor."<sup>20</sup>

Although the Klansmen who stood trial were not allowed to testify during the course of the trials, they were allowed to make a statement before they were sentenced. Judge Bond questioned these men as he had those who came to court to plead guilty. Once again the judge was looking for repentance. And here again the punishment fit both the crime and the social status of the perpetrator. Robert Hayes Mitchell, the first Klansman tried during the November 1871 session of the circuit court had been a member of the Klan since 1868. Mitchell was a farmer who had farmed for himself, apparently on someone else's land, for the past two years. He rode with the Klan the night Jim Williams was hung, but he had been unaware of the purpose of the raid. While the advance party murdered the militia captain, Mitchell had remained with the group who held the horses. He turned himself in to the authorities, making confession to Major Merrill. He had planned to plead guilty, he stated, but the defense lawyers had encouraged him to stand trial instead. Judge Bond fixed Mitchell's sentence at

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<sup>20</sup>Hugh Bond to Anna Bond, 9 February 1871, Bond Papers, Maryland Historical Society; Proceedings, pp. 774, 782, and *passim*; Jean Baker, The Politics of Continuity: Maryland Politics from 1858-1870 (Baltimore: Johns Hopkins University Press, 1973), pp. 183-84.

eighteen months and a one hundred dollar fine. Mitchell's manner had impressed the court. Bond was convinced that he had known nothing of the crime that was to be committed; had it been otherwise, the court would "exhaust the full penalty of the law, and then consider that you had been very mercifully dealt with."<sup>21</sup>

The court was harder on the two men tried in the second trial. John W. Mitchell--a Klan chief whose Klan was allegedly responsible for several murders--was an educated and influential member of the white community. Although he claimed to have been beside the bed of his ailing mother when he was supposedly outraging the black community, the jury found him guilty on two counts of conspiracy. "All these young and ignorant people had a right to look to you for direction," Bond instructed Mitchell. Thus he had failed the entire community. Instead of fulfilling his position of leadership for good, he had led the Ku Klux Klan. Mitchell received the stiffest sentence of any of the Klansmen tried during the November 1871 session of the circuit court, five years imprisonment and a one thousand dollar fine. The penalty fit both the crime and the perpetrator's social status. To Thomas B. Whitesides, the physician who had been tried with Mitchell, Bond assigned a lighter sentence, one year in prison and a one hundred dollar fine. The prosecution had not proved, as Judge Bond

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<sup>21</sup>Proceedings, pp. 457-9.

recognized, that Whitesides had ever been on a raid or played any kind of an active role in the Klan. A person of his position was nonetheless responsible for communicating his knowledge of the Klan to the authorities. Instead he had acquiesced to the values of the Ku Klux Klan. The Enforcement Acts would have never been necessary, Bond insisted, "if gentlemen in your position in York County, having found out what was going on, had united to put it down."<sup>22</sup>

Judge Bond chose a light sentence for John S. Millar, who was a poor choice for prosecution in the first place. Millar was a plantation owner who employed many hands. He had been tried and found guilty on only one count of conspiracy to prevent the freedmen from voting. Although he had attended two meetings of the Klan, allegedly to protect his hands, the witnesses for both the prosecution and defense agreed that he had never ridden with the Klan. Indeed the Klan had come twice looking for Millar before he started to attend their meetings. "The Court is of opinion that you are the least guilty of the parties brought here," Judge Bond said to Millar. He required him to serve only three months and pay a \$20 fine.<sup>23</sup>

Judge Bond never had the opportunity to sentence Edward T. Avery, the defendant who fled during the course of his

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<sup>22</sup>Ibid., pp. 603-6.

<sup>23</sup>Ibid., pp. 651-3.

trial. If he had he doubtless would have imposed a stiff sentence. Avery was an educated and influential member of the white community, the kind the judge held most responsible for the outrages of the Ku Klux Klan. Bond refused to drop the charges against Avery when Attorney General Williams ordered him to do so in 1873, and "with his own hand struck out the portions" of the end of session order pertaining to the runaway. Avery's jumping bail and disappearing had made for a very angry judge.<sup>24</sup>

The bench continued during the subsequent court sessions to impose sentences which differed widely according to the crimes actually committed and the social position of the criminal. The prosecution made a concentrated effort during the later trials to try those involved in crimes of a heinous nature. Thus the bench, during the April 1872 session of the fourth circuit court, imposed harder sentences on the guilty, both those who pleaded guilty upon arraignment and those who stood trial. Sentences during this session of the court ranged from one month for two men who had already spend considerable time in jail awaiting trial to ten years and a \$1,000 fine for several men whose indictments included murder counts. Leander Spencer, for example, had been tried for conspiracy and murder. When the case resulted in a hung jury, the prosecution had dropped

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<sup>24</sup>D.T. Corbin to G.H. Williams, 26 April 1873, S.C.F., S.C.

the murder charges for a guilty plea rather than trying Spencer again. Spencer nevertheless was sentenced to ten years and \$1,000, the maximum imposed on any nightrider. Several others who pleaded guilty received sentences of eight to ten years. Robert Riggins' sentence was lighter. The jury had found Riggins guilty of conspiracy, not guilty of murder. He got three years and a \$100 fine.<sup>25</sup>

The prosecution--even after it had failed in its goal of securing a broad nationalization of fundamental rights for the freedmen--had two important goals in mind throughout the Klan trials. First to make the guilty pay for their crimes. The second goal was perhaps even more important--to convince the white South that the federal government would no longer tolerate the counterrevolution which the Ku Klux Klan represented. In this purpose the federal government was initially successful. Guilty Klansmen fled the area by the hundreds. The violence abated. But white Southerners kept their eyes peeled for any signs of vacillation on the part of the government. Their watchfulness was soon rewarded. Preservation of equal rights for the freedmen required a strong federal presence which the Republican government was simply unwilling to maintain over a long period of time.

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<sup>25</sup> Minute Book, United States Circuit Court for South Carolina, April Term 1872, Criminal Docket, pp. 53-4, 80, 84-5, 87-9.

Most of the South Carolina Ku Klux Klan cases were simply never put to trial, a fact which is not surprising in light of the sheer numbers involved. It took almost six weeks during the initial court session in Columbia to try only five men in four trials. Forty-nine guilty pleas added to the prosecution's success rate, but the number scarcely made a dent in the load. Some 278 cases were carried over to the next term. Another eighteen cases were tried during the April term of 1872, but the backlog continued to swell as the federal grand juries continued their work. Although ninety-six cases were terminated in South Carolina during 1872, over 1,200 cases in South Carolina were still pending at the end of the year. Such a case load threatened to overwhelm the federal courts in the South for many years to come. The press of business on the criminal docket made it difficult, if not impossible, for the courts to attend to civil matters. Something clearly had to be done. Attorney General Williams decided as early as December 1872 to back away from enforcement of black rights: "My desire is that the pending prosecutions be pushed only as far as may appear to be necessary to preserve the public peace and prevent further violations."<sup>26</sup>

Major Merrill strongly advised the Attorney General that the white South would construe any retreat from a

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<sup>26</sup>Returns for the Annual Report of the Attorney General, 1871-1872, S.C.F., S.C.; Williams to D.T. Corbin, 7 December 1872, Instruction Book C, pp. 535-36, RG 60, NA.

strong enforcement policy as weakness. Merrill emphasized to the Attorney General that the policy of trying only those of high social status and those guilty of the most heinous crimes had already exempted some five or six hundred South Carolina Klansmen from prosecution, an amazing degree of clemency. Because of the "inadequacy of the machinery of the United States courts, and the utter worthlessness of the state courts in this section hundreds of participants in murder even will never be brought to justice." The causes which bred the Ku Klux Klan had not changed, Merrill continued: "The blind unreasoning, bigoted hostility to the results of the war is only smothered not appeased or destroyed. The only safety or assurance for safety for citizens is the protection of the general government." A policy of executive clemency, Merrill warned, would be interpreted as "a confession that wrong had been done." Mercy for the local Republicans, especially those who had dared to testify in court, demanded that the government stand firm.<sup>27</sup>

Williams determined, nonetheless, on a policy of clemency. Prosecutions under the Enforcement Acts were discontinued or postponed during the spring of 1873. Williams was evidently more concerned about public opinion and the cost of the prosecution effort than he was about

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<sup>27</sup>Lewis Merrill to George Williams, 30 September 1872, S.C.F., S. C.

justice. "These prosecutions as a general rule are carried on to enforce an observance of the laws of the United States and protect the rights of citizens," he wrote a federal attorney in Texas; "when those ends are accomplished, it is not desirable to multiply suits of this description as they tend to keep up an excited state of feeling, and are a great expense to the United States."<sup>28</sup>

Williams hoped that his appeasement policy would serve as a deterrent for further Klan crime; in his mind suspension of the prosecution effort would "produce obedience to the law, and quiet and peace among the People." He instructed the district attorneys in the Carolinas to nolle prosequi all but the worst cases. "The Government has reason to believe that its general intentions in prosecuting these offenses . . . have been accomplished, that the particular disorder has ceased, and that there are good grounds for hoping that it will not return," he wrote: "At all events it affords the Government pleasure to make an experiment based upon these views."<sup>29</sup>

This policy seems singularly ignorant in light of the South's continued hostility to Reconstruction. Peace had

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<sup>28</sup>Williams to A. J. Evans, 16 April 1873, Instruction Book C, p. 696, RG 60, NA. President Grant began around the same time to pardon those Klansmen who were already serving sentences. See Kaczorowski, Politics of Judicial Interpretation, pp. 111-12.

<sup>29</sup>Williams to Virgil S. Lusk, 21 June 1873, quoted in Kaczorowski, p. 111; Williams to V.S. Lusk, 25 April 1874, Instruction Book D, p. 511, RG 60, NA.

been attained, as Major Merrill had stressed, only because of a strong federal presence. As the Northern electorate tired of the interminable Southern problem, the Grant Administration in general and the Attorney General in particular lost interest in maintaining the rights of their black constituency. Appeasing Southern Democrats and pinching pennies seemed more important than the rights of the freedmen. The Justice Department was forced to economize by a Congress which had armed the federal government with strong enforcement laws, apparently expecting them to be self-perpetuating. The trials had dramatically increased federal expenses in the South. But money to fund the effort was not forthcoming. Thus Williams warned the local officials in an increasingly menacing tone that they must practice the most "rigid economy."<sup>30</sup>

Even more important to the Administration and the Attorney General were the desire to win public approval. Indeed the expressed justification for cancelling the enforcement effort merely masked the real reason: "Expediency was the primary consideration," as Everette Swinney put it. Williams had become one of the most unpopular men in the country. A congressional committee had investigated his alleged excesses in the use of federal

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<sup>30</sup>Williams to A.J. Evans, 16 April 1873, Instruction Book C, RG 60, NA. On the effort to economize see for example Williams to R.M. Wallace, 27 August 1872, and Williams to D.T. Corbin, 29 August 1872, Instruction Book C, pp. 438-39, 440-41, RG 60, NA.

troops. Newspapers ridiculed him as the "Secretary of State for Southern Affairs." Nominated by Grant to the Supreme Court center seat in 1873, Williams quickly became the focus of a huge public outcry against his appointment. The bar opposed him on the grounds that he was "wanting in those qualifications of intellect, experience and reputation which are indispensable to uphold the dignity of the National court, and to maintain respect for the law in the person of the officer who presides over the administration." The national press uncovered a number of scandals concerning his private use of Justice Department funds.<sup>31</sup> Williams could ill afford any further negative publicity.

Thus the Attorney General and indeed the entire scandal ridden administration became scrupulously sensitive to public opinion. Williams lent a willing ear to anyone who complained about the excesses of the enforcement efforts in the South. He sent a steady barrage of letters to Corbin in South Carolina inquiring about the particulars in various cases. Williams' tone indicated he assumed that the various complaints were valid. Clearly he was more interested in the good will of Southern Conservatives than he was in seeing justice done. President Grant similarly entertained

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<sup>31</sup> Williams allegedly used government funds to purchase a handsome carriage, complete with horses and liveried servants. Sidney Teiser, "Life of George H. Williams: Almost Chief-Justice," Oregon Historical Quarterly, 47 (December 1946): 421-29. Everette Swinney, "Enforcing the Fifteenth Amendment, 1870-1877," Journal of Southern History, 28 (May 1962): 206-7.

the notions of white Southerners who came to call on him at Long Branch. The President soon announced a policy of clemency for those Klansmen who had not yet been tried and pardon for those who had.<sup>32</sup>

The government policy was a disaster. "There is a fixed determination on the part of these bad men," a local white Republican complained, "never to acknowledge the results of the war." Rather than persuading the whites to do good, the government had convinced them they could get away with murder. Pardoned Klansmen had returned to the scene of their crimes once again to "broadcast over this section the seeds of rebellion, sedition, and murder." The Democrats quickly began to prepare for the coming election of 1874. Rifle clubs, white leagues, and secret police, "organized ostensibly for 'social purposes,'" made a show of force in both town and countryside throughout the state. Rumor had it that Democrats from the Augusta, Georgia area would help the local whites take over the polling places. The Democrats insisted that the freedmen were responsible

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<sup>32</sup>See for example Williams to Corbin, 9 November 1872, Instruction Book C, p. 575, and Williams to Corbin, 23 April 1872, Instruction Book D, p. 2, RG 60, NA.; W.D. Parker, J.B. Kershaw, and R.M. Sims to George H. Williams, 30 July 1873, S.C.F., S.C. General J.B. Kershaw, one of the leading South Carolina Democrats who visited Grant and persuaded him to adopt a policy of forgiveness was reportedly the Grand Cyclops of the Ku Klux Klan in South Carolina in 1874. See J.C. Winnsmith to U.S. Grant, 5 October 1874, S.C.F., S.C. Kaczorowski, Politics of Judicial Interpretation, pp. 110-13; William Gillette, Retreat from Reconstruction, 1869-1879 (Baton Rouge: Louisiana State University Press, 1979), pp. 36-7.

for starting all the problems, and once again the whites were forced to take up their arms to defend themselves. Outrages were frequent. Republicans appealed to the federal government for more troops.<sup>33</sup>

Apparently recognizing the folly of expecting leniency to produce obedience to the law, Williams ordered vigorous efforts under the Enforcement Acts. "I consider it my duty," he wrote his field attorneys in the South "to instruct you to proceed with all possible energy and dispatch to detect, expose, arrest, and punish the perpetrators of these crimes; and to that end you are to spare no effort or expenses." Troops were made available, and the election proceeded relatively peacefully in South Carolina.<sup>34</sup>

Consistency was not a virtue of the Grant Administration, however. As soon as the election was over, Williams changed his tune. "I am not aware of anything that has transpired that should lead you to inquire whether or not you would be sustained by this department in taking vigorous and active measures," he wrote a district attorney, indicating that he was in favor of a strong enforcement

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<sup>33</sup>R.M. Wallace to George H. Williams, 3 September 1874; L.C. Carpenter to U.S. Grant, 26 August 1874 and 4 September 1874; J.C. Winnsmith to U.S. Grant, 5 October 1874; Gov. T.J. Moses, Jr. to George H. Williams, 26 September 1874, all in S.C.F., S.C.

<sup>34</sup>Williams to D.T. Corbin, 3 September 1874, Instruction Book C, pp. 13-14, RG 60, NA; Gillette, Retreat from Reconstruction, pp. 36-7.

policy. What Williams gave with one hand he took away with the other. "You should be careful," he cautioned, "and not involve the government in groundless or frivolous prosecutions, which are not only an annoyance and an invitation to the people, but are a matter of great expense to the United States." Pleasing the public and saving money were, once again, more important to the Attorney General than the rights of the freedmen. Enforcement efforts were discontinued.<sup>35</sup>

The government in the Ku Klux Klan trials had successfully prosecuted a number of the nightriders and stopped for the time being the outrages of the Ku Klux Klan. Perhaps a sustained effort to stamp out political terrorism would have effected real changes in the social and political structure of South Carolina, but a serious lack of consistency hampered the entire effort. The political costs of enforcement had made the freedmen an impediment to the Republican Administration. Thus the President and Attorney General both chose to believe in the good faith of the enemy. White Southern Democrats soon realized that they had nothing to fear from a vacillating central government dedicated more to pleasing an impatient, unsympathetic Northern electorate than to providing substantive rights for

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<sup>35</sup>Williams to G. Wiley Wells, 19 December 1874, Instruction Book E, p. 201, RG 60, NA.

the freedmen.<sup>36</sup> Recognizing that the Republican Party had begun a general retreat from the policy of enforcement, white South Carolinians determined in 1876 to mount an all out campaign to "redeem" the state from its oppressors.

Confederate hero Wade Hampton, the Democratic candidate for governor, was personally a moderate on racial issues pledged to "know no race, no party, no man, in the administration of the law." No rights enjoyed by the black people would be withdrawn, according to his campaign promises. "We propose to protect you and give you all your rights," he insisted, "but while we do this you cannot expect that we should discriminate in your favor, and say because you are a colored man, you have the right to rule the State." The Democratic program in 1876 was basically a paternalistic program of white supremacy which left room for the talented few of the black race. Hampton's problem was keeping the Negrophobes like Martin W. Gary and young Ben Tillman in line.<sup>37</sup>

Political violence and the threat thereof played a significant role in the redemption of South Carolina. Rifle and sabre clubs previously organized all over the state for

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<sup>36</sup> Gillette, Retreat from Reconstruction, pp. 54-55, 370-71.

<sup>37</sup> George Brown Tindall, South Carolina Negroes, 1877-1900 (Columbia: University of South Carolina Press, 1952), pp. 19-22; William J. Cooper, Jr., The Conservative Regime: South Carolina, 1877-1890 (Baltimore: Johns Hopkins, 1968), p. 28.

"social purposes" eagerly joined Hampton's gubernatorial campaign. The official Democratic policy in 1876 was "force without violence." Thousands of Redshirts--so called as a gesture of defiance toward the Republican tradition of "waving the bloody shirt"--rode with Hampton in a deliberate attempt to strike fear in the hearts of black voters. Torchlight parades, martial bands, booming canons, and above all the bloodcurdling sound of rebel yells swelled the hopes of white South Carolinians and signaled to the black population that a new day was dawning. Redeemer sources indicate that this paramilitary force was so tightly organized that "aggressive intimidation" won the day for the Democrats. "There is an organized plan throughout the state of South Carolina not to have any violence committed on anybody;" one black official was reported to have complained, "but the plan of intimidation was so thorough that there was no need to have any violence."<sup>38</sup>

If Hampton managed to keep a tight rein on his forces most of the time, violence did abound during the pre-election period. The race riot replaced the outrage as the preferred political statement. Traditional sources have insisted that armed blacks once again constituted a danger and provoked the whites to violence. Justice Department

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<sup>38</sup>Hampton M. Jarrell, Wade Hampton and the Negro: The Road not Taken, (Columbia: University of South Carolina Press, 1950), pp. 158-73; Alfred B. Williams, Hampton and His Redshirts: South Carolina's Deliverance in 1876 (Charleston: Walker, Evans & Cogswell, 1935) pp. 161-63.

records tell a different story, however, one with which Joel Williamson concurred. Whites often preferred a fight to a peaceful settlement in order to provide a concrete example of the force which lay behind the redeemer efforts.

President Grant complied with Governor Chamberlain's request for troops, thus assuring a relatively peaceful election.<sup>39</sup>

The election itself, according to a correspondent of the Atlantic Monthly was "one of the greatest farces ever seen." Where terror failed to work, fraud prevailed. "The Democrats cheated and intimidated and bribed and bulldozed and repeated where they could," a Hamptonite admitted later, "and the Republicans did likewise."<sup>40</sup> There followed a period of confusion--during which both political parties inaugurated their gubernatorial candidates--compounded by uncertainty over the presidential election. The presence of federal troops enabled the Republicans to maintain control of the state offices until April when the new President, Rutherford B. Hayes, announced his decision to withdraw the last of the federal troops from the South. Hayes, like the President and Attorney General who preceded him, apparently believed that he could trust Southern whites

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<sup>39</sup> Reynolds, Reconstruction in South Carolina, pp. 344-47, 375-81; Williamson, After Slavery, pp. 268-72; D.T. Corbin to Alphonso Taft, 9 October 1876, R.W. Wallace to A. Taft, 18 October 1876, D.H. Chamberlain to U.S. Grant, 11 October 1876, all in S.C.F., S.C.

<sup>40</sup> Tindall, South Carolina Negroes, p.14; Williams, Hampton and His Red Shirts, p. 365.

to keep their promises to respect black rights. After the midterm elections he was forced to admit, however, that "the experiment was a failure." By 1880 Hayes was complaining that a "practical nullification" of the Fifteenth Amendment had robbed the Republicans of a majority in both houses of Congress.<sup>41</sup>

South Carolina led the vanguard to nullify the voting rights of black citizens. Having reestablished home rule, the state legislature soon determined--despite the campaign promises of Governor Hampton--to institute state election laws which effectively disfranchised the freedmen. The state "promoted" Hampton to the United States Senate after a two year term as Governor, leaving his place to be filled by those less willing to allow limited political participation to the state's black citizens. The hard won benefits of Reconstruction were in grave danger of disappearing at the hands of the state's "Redeemers." The protection of the rights of black people across the United States depended upon decisions made in the Supreme Court.

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<sup>41</sup>On the Compromise of 1877 see C. Vann Woodward, Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction (Boston: Little Brown, 1951). George Brown Tindall, The Disruption of the Solid South (New York: Norton, 1972), pp. 9-10; Vincent P. De Santis, Republicans Face the Southern Question: The New Departure Years, 1877-1897 (Baltimore: Johns Hopkins Press, 1959), pp. 66-103; Robert M. Goldman, "A Free Ballot and a Fair Count: The Department of Justice and the Enforcement of Voting Rights in the South, 1877-1893 (New York: Garland, 1990), p. 98.

## CHAPTER 7 ENFORCEMENT IN THE SUPREME COURT

While Democrats in South Carolina and throughout the South proceeded to disfranchise black citizens, the Supreme Court followed the lead of the executive branch in its own retreat from Reconstruction. Basically the nation's high tribunal construed the Reconstruction Amendments in a manner which left traditional state-based federalism unaltered. This conservative reading of the Fourteenth and Fifteenth Amendments is not surprising in light of Judge Bond's similar reluctance to recognize any fundamental changes wrought by the Fourteenth and Fifteenth Amendments. That other possibilities existed, however, was clear.

Circuit Court Judge William B. Woods in an Alabama case, U.S. v. Hall, had interpreted the Fourteenth Amendment in a manner which provided the broad nationalization of civil and political rights for which Corbin and Chamberlain had argued in the South Carolina Klan cases. Upholding the constitutionality of the first Enforcement Act and the indictments brought under it against private persons for interfering with the rights of free speech and assembly, Woods declared that "the right of freedom of speech and the other rights enumerated in the first eight articles of the

amendment" are the "privileges and immunities of citizens of the United States" as secured by the Fourteenth Amendment.<sup>1</sup> This nationalistic interpretation of the Fourteenth Amendment provided an alternative to the conservative opinion of Judge Bond.

That the Fourteenth Amendment had made some changes in the rights of citizenship seemed clear. Exactly which rights were secured was more cloudy. Did the Fourteenth Amendment nationalize the Bill of Rights? What were the privileges and immunities of national citizenship? Was Congress authorized to protect the freedmen from private acts or only in cases of state action? The backlog of civil rights cases in the South demanded a decision by the high court, yet the justices had refused to address these issues as presented in U.S. v. Avery, and the Attorney General had scotched federal efforts to secure answers to these problems in U.S. v. Sapaugh.<sup>2</sup>

For its interpretation of the rights of citizens under the Fourteenth Amendment, the Supreme Court chose, ironically, a case which involved white butchers rather than black freedmen, a case in which the United States was not even a party. Thus the Fourteenth Amendment was construed initially in an atmosphere which effectively depoliticized

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<sup>1</sup>26 Federal Cases, 79-82. See also Kaczorowski, Politics of Judicial Interpretation, pp. 14-17.

<sup>2</sup>13 Wall 251 (1872); Supreme Court Appellate Case Files, file number 6482, NA. See chapter V. above.

the explosive legal questions involved, enabling the High Court to decide some of the controversial issues which had appeared in the Ku Klux Klan Cases without hearing them at all. If the Slaughterhouse Cases were about white butchers, they nevertheless presaged nothing but evil for the civil rights of the nation's blacks.<sup>3</sup>

The carpetbag government of Louisiana had established in New Orleans a monopoly of butchers which threatened to drive all other slaughterhouses out of business. Although the law would ordinarily fall under the police powers of the state, the other butchers brought suit on the grounds that their Thirteenth and Fourteenth Amendment rights had been violated. John A. Campbell, a former Supreme Court Justice who had resigned to follow his state into the Confederacy, attacked the state law on the grounds that it was a form of servitude outlawed by the Thirteenth Amendment. Campbell particularly pressed the point that the monopoly violated the "privileges and immunities" guaranteed to citizens by the Fourteenth Amendment. Among these privileges was the right to follow the vocation of one's choice.<sup>4</sup>

Speaking for a closely split majority, Justice Samuel Miller recognized that "no questions so far reaching and

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<sup>3</sup>16 Wallace 36, (1873); Kaczorowski, Politics of Judicial Interpretation, p.143.

<sup>4</sup>Charles Fairman, Mr. Justice Miller and the Supreme Court, 1862-1890 (Cambridge: Harvard University Press, 1939), pp. 179-81.

pervading in their consequences . . . have been before this court during the official life of any of its present members." The justice quickly rejected the Thirteenth Amendment argument, then turned to the Fourteenth. The primary purpose of the Fourteenth Amendment, according to Miller, was to provide citizenship for the blacks. He seemed genuinely surprised to think that the Reconstruction Amendments could be construed to uphold the rights of white citizens. If Miller interpreted the amendment to provide rights for the freedmen, however, his narrow reading of those rights gave them little reason to celebrate. National citizenship, according to Miller, was separate and distinct from state citizenship. The decision left the basic rights of citizens where they had always been, under the protection of the states. Miller listed a number of privileges and immunities which adhered to national citizenship, most of which would prove to be of little use to the freedmen. Basically the federal government could protect its citizens on the high seas or in foreign countries, but not in the states where they resided. That the Fourteenth Amendment was intended "to transfer the security and protection of all the civil rights . . . from the States to the Federal government" Miller emphatically denied. It was impossible, he decided, that the Congress meant to effect so drastic a change in the basic nature of the federal system.<sup>5</sup>

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<sup>5</sup>16 Wall 36 (1873), 67, 71-83.

Miller's tortured construction aroused bitter dissent among four of his judicial brethren. Invoking a scriptural analogy, Justice Noah Swayne asserted that the construction was "much too narrow;" Miller had so limited the intentions of the framers that he changed "what was meant for bread into a stone." Justice Field insisted that the fundamental rights of citizenship belong to citizens of the United States and are in no way dependent upon citizenship in a state. If the amendment meant no more than the majority said it did, he argued, "it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." The dissenting opinions recognized what Miller feared, that the Amendment was meant to transform the federal system. Rights were no longer to be "separate and exclusive" but "complementary and concentric," allowing the long arm of the federal government to reach in to protect the rights of its citizens when the states failed to do so.<sup>6</sup>

The Supreme Court had failed entirely to recognize the revolutionary changes in the federal system inherent in the Fourteenth Amendment. Instead the Court had left federal-state relations virtually unchanged. According to this interpretation the Fourteenth Amendment would not

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<sup>6</sup>16 Wall 36 (1873), 96, 129. Belz, Emancipation and Equal Rights, p. 131. The dissenting opinions of Field and Bradley also pointed the direction for future use of the Amendment in the area of substantive due process and right to contract.

incorporate the Bill of Rights; those fundamental liberties were not among the national rights Miller listed. The decision placed the basic rights of citizenship beyond the nation's authority to protect them. The privileges and immunities clause was emasculated. If the majority of Americans missed the political implications of Slaughterhouse, the Justices of the Supreme Court undoubtedly recognized that the case dealing ostensibly with the rights of white butchers would serve as precedent for any subsequent attempts to enforce the civil rights of black Americans. Slaughterhouse marked a turning point in the federal quest for the civil and political rights of black Americans. The narrow interpretation of the Fourteenth Amendment circumscribed any further attempts to establish a broad interpretation of the rights inherent in national citizenship.<sup>7</sup>

U.S. v. Cruikshank demonstrated the limitations that the Supreme Court in Slaughterhouse had placed on its future interpretations of the Fourteenth Amendment in cases concerning the civil and political rights of black Americans. The case involved a massacre of around 100 blacks in Colfax, Grant Parish, Louisiana, following the disputed election of 1872. Both parties claimed the offices of sheriff and judge. A black posse, commissioned by the

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<sup>7</sup>See Kaczorowski, Politics of Judicial Interpretation, pp. 150-66.

carpetbag governor, occupied the local courthouse on behalf of the Republican government. Whites attacked, set fire to the building, then shot the freedmen in cold blood as they attempted to escape the burning building. These atrocities were so heinous that Attorney General Williams was forced to abandon his appeasement policy and order a vigorous prosecution. His stinginess and lack of regard for black rights ruled the day, however, when he decided to try only six to twelve of the criminals as a deterrent for future lawlessness. Of the approximately 100 whites who were indicted, William Cruikshank and two others were convicted in federal circuit court under the sixth section of the Enforcement Act of 1870 which made it a felony to conspire to deprive blacks of their rights as citizens. The case was certified to the Supreme Court on a division of opinion concerning a motion in arrest of judgment between Circuit Judge William B. Woods who found both the law and the indictment sufficient and Supreme Court Justice Joseph P. Bradley (on Circuit) who considered the law and all counts of the indictment deficient.<sup>8</sup>

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<sup>8</sup>Loren Miller, The Petitioners; The Story of the Supreme Court of the United States and the Negro (New York: Pantheon Books, 1966), pp.108-9; C. Peter Magrath, Morrison R. Waite: The Triumph of Character (New York: Macmillan, 1963), p. 120; Donald D. Nieman, Promises to Keep: African-Americans and the Constitutional Order, 1776 to the Present (New York: Oxford, 1991), p 95.; Kaczorowski, Politics of Judicial Interpretation, pp. 175-76.

Cruikshank was tried on a thirty-two count indictment designed, like that in the South Carolina Ku Klux Klan trials, to establish a broad nationalization of black rights under the Fourteenth and Fifteenth Amendments. Indeed it was in Cruikshank that the Supreme Court finally resolved many of the questions which had come before the court in South Carolina. Under the sixth section of the Enforcement Act of 1870 the defendants were charged with conspiracy to "hinder and prevent" black citizens from enjoying their First and Second Amendment rights to assemble peaceably and to keep and bear arms. These counts assumed, like those in the South Carolina Klan trials, that the Fourteenth Amendment had made the Bill of Rights applicable to the states. Other counts charged conspiracy to deprive Afro-Americans of their lives and liberty without due process of law. Still others averred interference with the right to vote and the denial of equal protection of the laws and equal privileges and immunities. Another charged the intent to hinder the "free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured" by the United States Constitution and laws. Sixteen of the thirty-two counts also charged under the controversial section seven of the First Enforcement Act that murder was committed in the process of denying these

other civil and political rights. The defendants were acquitted on the murder counts, however.<sup>9</sup>

Bradley's circuit level opinion demonstrated a reversal in his ideas concerning federal authority to uphold the rights of the freedmen under the Fourteenth Amendment.

Woods had sought Bradley's advice in 1871 before writing the decision in U.S. v. Hall. Bradley had counseled Woods that the privileges and immunities clause secured "by direct federal intervention" all the fundamental rights of citizenship "either as against the action of the Federal government or the State governments."<sup>10</sup> Bradley's dissenting opinion in Slaughterhouse similarly contended that the Fourteenth Amendment had made a radical alteration in the federal system. "In my judgment," he said, "it was the intention of the people of this country in adopting that amendment to provide National security against violation by the states of the fundamental rights of citizens."

Bradley's ideas were not chiseled in granite, however: "My own mind is rather in the condition of seeking the truth, than of dogmatically laying down opinions," he wrote two years later.<sup>11</sup>

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<sup>9</sup>U.S. v. Cruikshank, 92 U.S. 542 (1876), 542-43.

<sup>10</sup>Bradley to Woods, 3 January 1871, quoted in Magrath, Morrison R. Waite, p. 121.

<sup>11</sup>16 Wallace 36 (1873), 122; Leon Friedman, "Joseph P. Bradley," in Leon Friedman and Fred L. Israel, The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions (New York: Chelsea House, 1969), II.:

Bradley's circuit level opinion in Cruikshank reiterated the dogma espoused by the majority in Slaughterhouse. His reasoning followed the line of traditional dual federalism and the state action concept. "The affirmative enforcement of the rights and privileges themselves," he stated, "belongs to the state government as a part of its residual sovereignty." The Fourteenth Amendment had not made any fundamental change in the federal system. When the Amendment stated that "no state shall deprive any person of life, liberty, or property," it established protection "against arbitrary and unjust legislation." It was never meant to protect the individual from ordinary crimes; that remained a part of the police powers of the state. The Fifteenth Amendment, moreover, did not grant a positive right to vote--here Bradley followed Judge Bond's reasoning in the South Carolina trials--but simply prevented any discrimination on the grounds of race. Since the Enforcement Act prohibited any kind of interference with the franchise, it "extends far beyond the scope of the amendment."<sup>12</sup>

The Supreme Court opinion in Cruikshank closely followed Bradley's circuit level opinion. That it should do so is not surprising in light of Slaughterhouse and Bradley's own change of heart. Indeed the brief prepared by

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1196-97.

<sup>12</sup>U.S. v. Cruikshank, 25 Federal Cases 707.

Attorney General George Williams and Solicitor General S.F. Phillips left the Supreme Court little option but to follow precedent. Rather than providing the Court a constitutional theory broad enough to support the nationalization of civil and political rights, the legal representatives of the United States completely abdicated any responsibility to uphold the constitutionally novel aspects of the case. Williams conceded defeat on all but two counts of the indictment, the fourteenth and the sixteenth. The fourteenth charged conspiracy to "prevent and hinder" two citizens of African descent from voting at future elections. The sixteenth charged the defendants with conspiring to deprive the same black citizens of "their several and respective free exercise and enjoyment of each, every, all and singular the several rights and privileges granted or secured . . . by the Constitution and laws of the United States." Thus the nation's top legal spokesmen chose never to argue the First and Second Amendment issues before the nation's high tribunal. All efforts to provide a nationalistic interpretation of the privileges and immunities and equal protection clauses were similarly abandoned. Williams' refusal to provide the Supreme Court a nationalistic interpretation of the Fourteenth Amendment helped ensure a states' rights interpretation. The Attorney General did attempt to demonstrate that the constitution and the Fifteenth Amendment granted ample authority to protect

all citizens in their right to vote and maintained that the Enforcement Act was authorized under the Amendment.<sup>13</sup>

While the United States seemed to invite a decision which would relieve the government of any further responsibility to enforce civil rights, the defense mounted an effective campaign to secure the same. The Louisiana terrorists were represented by such eminent counsel as David Dudley Field, brother of the Supreme court Justice, Reverdy Johnson, reiterating his ideas from the South Carolina Klan trials, and John Archibald Campbell who had completely switched his arguments since he represented the butchers in Slaughterhouse. The defense argued, predictably, for a narrow, states' rights interpretation of the Fourteenth Amendment. The fundamental rights of citizens, they insisted, remained where they had always been--under the protection of the states. Barron v. Baltimore had established that the Bill of Rights applied only to the national government, and nothing had happened in the intervening years to change that fact. The rights of national citizenship were limited to the few listed in Slaughterhouse. The national government, the defense continued, was bound to respect the state action concept

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<sup>13</sup>George H. Williams and S.F. Phillips, Brief for the United States, U.S. v. Cruikshank, in Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, ed. Philip B. Kurland and Gerhard Casper (Arlington, VA: University Publications of America, 1975), 7: 290-91; see also Kaczorowski, Politics of Judicial Interpretation, pp. 206-07.

established in the Fourteenth Amendment; since the state of Louisiana had not by legislation denied the rights of the citizens, the federal government was absolutely powerless to intervene. The defense absolutely denied the constitutionality of the First Enforcement Act because the law extended to the individuals who abridged the rights of the freedmen instead of to the state. Indeed since there was no state action, there was no need for any enforcement act at all. A state's lack of action to protect its citizens did not authorize federal intervention. Although there was no conviction under the seventh section of the Enforcement Act, the defense attorneys nevertheless protested that portion of the law. Congress had no authority, they insisted, to legislate in the area of ordinary common law crimes: "Congress in this legislation attempts to do indirectly what it cannot do directly," punishing such crimes "under the guise of some trivial matter over which it claims jurisdiction." The defense argued, moreover, that the indictment was too vague. It violated the defendants' constitutional right to know exactly the charges against him.<sup>14</sup>

Chief Justice Morrison Waite, speaking for the Court, seized the ammunition which the defense had provided. The decision rested on the constitutional doctrines of dual

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<sup>14</sup>David S. Bryon, Brief for Defendants, U.S. v. Cruikshank, in Kurland and Casper, Landmark Briefs, 7: 316-42.

federalism, dual citizenship, and state action. The court did not limit its interpretation of the Fourteenth Amendment and the Enforcement Act to the two counts which the prosecution had argued, but addressed the entire scope of the indictment. Waite defined a federal system, citing Slaughterhouse, of national and state governments which are separate and distinct. The rights adhering to national citizenship were different from those of state citizenship. Following Barron v. Baltimore, Waite announced that the First and Second Amendment counts were defective on the grounds that the Bill of Rights applied only to the national government. For protection of their individual rights the people must "look to the states. The power for that purpose was originally placed there, and it has never been surrendered to the United States."<sup>15</sup> Thus Waite completely rejected the notion that the Fourteenth Amendment was intended specifically to effect revolutionary changes in the relations between the national government and the states. So far as the Chief Justice was concerned, nothing had changed since the days of the Founding Fathers.

The counts charging deprivation of life and liberty without due process of law Waite declared "even more objectionable." They amounted to "nothing else than alleging a conspiracy to falsely imprison or murder." Such meddling in the police powers of the state could not be

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<sup>15</sup>U.S. v. Cruikshank, 92 U.S. 542 (1875), 549-54.

sanctioned: "It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state, than it would be to punish for false imprisonment or murder itself." Since the law itself applied to individuals rather than to the state, Waite found it objectionable. The Fourteenth Amendment provided that no state should deprive a person of liberty; it added "nothing to the rights of one citizen as against another." Waite refrained from declaring the Enforcement Act unconstitutional, but he nonetheless cast a pall over any future use of the law to punish individuals guilty of violating the civil rights of others.<sup>16</sup>

The Chief Justice voided all counts of the indictment, reversing the convictions of Cruikshank and the other two men who had been chosen from the ninety-seven indicted to discourage future atrocities against the civil and political rights of the freedmen. Approximately 100 blacks had been brutally murdered in Louisiana, yet no one had to pay. The Supreme Court had allowed its interpretation of national citizenship in Slaughterhouse to circumscribe the meaning of the Amendment for those people for whom it was intended to bestow all the benefits of citizenship. The argument that the state had not failed to protect the rights of citizens was, as Loren Miller put it, "a sterile exercise in

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<sup>16</sup>92 U.S. 542 (1875), 553-54. For an excellent analysis of Cruikshank see Kaczorowski, Politics of Judicial Interpretation, pp. 214-17.

constitutional double-speak."<sup>17</sup> The states refused to defend the civil rights of the freedmen. Congress attempted through the Enforcement Act to supply the defect. Now the Court would not allow the national government to protect them either. The Chief Justice spoke for eight members of the Court; Justice Clifford agreed that the judgment should be arrested but based his decision on technical problems with the indictment. The legal officers of the United States had not even exerted themselves to provide a constitutional theory broad enough to maintain the rights of all citizens.

The Court threw out the count which charged interference with the right to vote, because it failed to allege that the conspiracy was predicated upon race. "We may suspect that race was the cause of the hostility," Waite piously noted of this case in which 100 white men viciously murdered 100 blacks, "but it is not so averred." As with the indictment in Cruikshank so with the law itself in a companion case. Sections three and four of the First Enforcement Act fell on the same grounds in U.S. v. Reese, in which the Supreme Court construed for the first time the meaning of the Fifteenth Amendment for black citizens.<sup>18</sup>

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<sup>17</sup>Miller, The Petitioners, pp. 111-12.

<sup>18</sup>92 U.S. 542 (1876), 556; U.S. v. Reese, 92 U.S. 214 (1876).

Voting officials in Kentucky had attempted to disfranchise black citizens by refusing to accept their poll taxes and then declining their votes on the grounds that they had not paid the required fees. Kentucky Republicans went to court to protest. Hiram Reese, a local election official, was indicted on four counts of violating the Enforcement Act of 1870 for refusing to allow William Garner, a qualified voter of African descent, to vote because of his race and color.<sup>19</sup>

Chief Justice Waite once again spoke for the Court. The Fifteenth Amendment, he noted, echoing Judge Bond's observations in the Ku Klux Klan trials, did not confer a positive right to vote. The states retained the authority to decide who votes. The Amendment had, nevertheless, invested the people with a new constitutional right: "That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." Congress had the authority under the enabling clause to enforce that right by appropriate legislation. The question, then, was whether the First Enforcement Act was "appropriate legislation." Waite concluded that it was not. The problem, according to

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<sup>19</sup>For background information on Reese see William Gillette, "Anatomy of a Failure: Federal Enforcement of the Right to Vote in the Border States During Reconstruction," in Richard O. Curry, ed., Radicalism, Racism, and Party Realignment: The Border States During Reconstruction (Baltimore: Johns Hopkins Press, 1969), pp. 265-304.

the Chief Justice, was overbreadth. While the Fifteenth Amendment prohibited interference with the franchise only on the grounds of race, color, or previous condition, the Enforcement Act forbade "every wrongful refusal to receive the vote of a qualified elector at State elections." The Enforcement Act attempted to "set a net large enough to catch all possible offenders" rather than "manifesting any intention to confine its provisions to the terms of the Fifteenth Amendment." Sections three and four were struck down as unconstitutional.<sup>20</sup>

Justice Ward Hunt dissented. Because the Enforcement Act made clear in the first two sections that it forbade discrimination on the grounds of race and color, he insisted, the following sections did not have to repeat the formula. "By the words 'as aforesaid,' he reasoned, "the provisions respecting race and color of the first and second sections of the statute are incorporated into and made a part of the third and fourth sections." For Hunt, the intentions of Congress were plain; the problem was with the Court. "Good sense," he concluded, "is sacrificed to technical nicety, and a sound conclusion to an extravagant extent."<sup>21</sup>

If Waite had sacrificed his good sense, he had not accepted defense counsel's argument that the Fifteenth

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<sup>20</sup>92 U.S. 214 (1876), 216-21.

<sup>21</sup>Ibid., pp. 242-43.

Amendment could be applied only in cases of overt state action. He left standing the sections of the Enforcement Act which explicitly prohibited voter discrimination because of race. Thus the decision suggested that both private individuals and state officials could be punished for denying the franchise on racial grounds.<sup>22</sup> Reese left the door wide open, however, for voter discrimination on other grounds. The Southern states quickly discerned effective methods of disfranchising their black citizens.

The Supreme Court in Cruikshank and Reese had finally addressed most of the issues which had been pending at least since the great South Carolina Ku Klux Klan trials in 1871. The results were disappointing for the rights of black citizens. The Court's narrow interpretation of the Fourteenth Amendment in Slaughterhouse had circumscribed any future use of the Amendment for the freedmen. The rights inherent in national citizenship were separate and distinct from those of state citizenship--and basically meaningless for black Americans. The Fourteenth Amendment did not incorporate the Bill of Rights. The national government could uphold the rights of its black citizens only in cases of state action; a state's lack of action to protect its citizens could not be construed as a reason for the federal government to intervene. If the Court did not specifically

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<sup>22</sup>Donald N. Nieman, Promises to Keep, pp. 98-99; Kaczorowski, Politics of Judicial Enforcement, p. 213.

rule on the problem of charging ordinary crimes in conjunction with civil rights offenses, the allegation that conspiracy against life and liberty were nothing more than charges of murder and false imprisonment and therefore unacceptable in federal court made clear the Court would not countenance any tampering with the traditional police powers of the states. The High Court's interpretation of the Fifteenth Amendment left more room for the federal government to maneuver, but the lack of a positive right to vote--a clear call given the negative wording of the Amendment--foreshadowed the eventual disfranchisement of most black citizens.

The government attempted in U.S. v. Harris to regain some of its losses from Cruikshank. An armed mob in Tennessee had taken some blacks from the custody of a sheriff, killed one of them, and beaten the others. The men were charged with conspiracy to hinder state authorities from providing equal protection of the laws and equal privileges and immunities. The case was designed to test the constitutionality of section two of the Ku Klux Klan Act of 1871.<sup>23</sup> Justice William B. Woods, now elevated to the Supreme Court bench, found that the Klan Act failed the examination.

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<sup>23</sup>The law had become section 5519 of the Revised Statutes in 1873.

Woods' decision, a remarkable change of heart since he wrote U.S. v. Hall, made more explicit the state action concept implicit in Cruikshank. The provisions of the Fourteenth Amendment, Woods declared, "have reference to State action exclusively, and not to any action of private individuals." When the state "has not made or enforced any law abridging the privileges or immunities of citizens of the United States . . . the amendment imposes no duty and confers no power upon Congress." The Klan Act was bad law, because it punished private wrongs without any reference to state laws or the administration of those laws by state officials. According to this interpretation the Fourteenth Amendment allowed federal involvement only when a state had passed discriminatory legislation. A state's "sins of omission" which allowed violation of black citizens' rights were outside the purview of the Amendment.<sup>24</sup>

The state action concept once again was the determinant in the Civil Rights Cases of 1883. These five cases from across the United States went up through the courts simultaneously, demonstrating that while slavery had been a Southern problem, racism was national. The issue was the constitutionality of the first two sections of the Civil Rights Act of 1875--extremely controversial even at the time it was passed--which attempted to secure equality of social

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<sup>24</sup>U.S. v. Harris, 106 U.S. 629 (1883), 638-39; Miller, The Petitioners, pp. 113-14.

rights for blacks. Section one provided equal access to privately owned public facilities--hotels, theatres, restaurants, transportation--for all patrons, regardless of race. Section two made it a misdemeanor to deny the use of such accommodations on account of race. Congress had proceeded with the law on the assumption that such businesses were subject to federal law, because they were licensed and regulated by state authority. When the states refused to uphold the rights of blacks, the federal government could assist. Resistance to the law was widespread, however. Federal officers hesitated even to attempt enforcement of a law regulating the private sector.<sup>25</sup>

The Supreme court ruled on the issue in 1883. Justice Bradley, for the majority, concluded that the Civil Rights Act was an unwarranted usurpation of state authority on the part of the federal government. The Fourteenth Amendment authorized national interference only in the case of state action: "It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action." Only "corrective legislation" was allowed. If there was no state law which

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<sup>25</sup>Bertram Wyatt-Brown, "The Civil Rights Act of 1875," Western Political Quarterly, 18(December 1965): 763-75; Herman Belz, Emancipation and Equal Rights, pp. 134-5; John Hope Franklin, "Enforcement of the Civil Rights Act of 1875," Prologue, 6(Winter 1974): 225-35.

discriminated against the rights of blacks, then there was no federal remedy. "Individual invasion of individual rights," Bradley insisted, "is not the subject matter of the amendment." The law was clearly unconstitutional, according to this interpretation, and businesses could refuse to admit whomever they chose.<sup>26</sup>

Bradley also found the Thirteenth Amendment argument irrelevant. While the Amendment authorized the national government to make any laws necessary to "eradicate all forms and incidents of slavery," refusing service to a black person had "nothing to do with slavery or involuntary servitude." If such a wrong violated any right, redress should be sought under the laws of the state. Bradley ceremonially washed his hands of the freedmen's problems: "There must be some point in the elevation of the ex-slave, when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."<sup>27</sup>

There was only one dissenting vote, John Marshall Harlan I. It was "scarcely just," he insisted, "to say that the colored race has been the special favorite of the laws." The idea was to "secure and protect" for blacks the rights that white men had always enjoyed. "The one underlying

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<sup>26</sup>109 U.S. 3 (1883), 10-12.

<sup>27</sup>Ibid., pp. 23-25.

purpose of congressional legislation," he found, "has been to enable the black race to take the rank of mere citizens." Harlan found authority for the Civil Rights Act in both the Thirteenth and Fourteenth Amendments. Discrimination by individuals or corporations of a public or quasi-public nature, was for Harlan, "a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment."<sup>28</sup>

Harlan read the Fourteenth Amendment in a manner which provided broad powers for the national government. Citizenship was a positive grant which clothed the former slaves with all the fundamental rights inherent in a free people. The fact that the Amendment prohibited the states from making discriminatory law did not, for Harlan, mean that Congress was denied "the power, by general, primary, and direct legislation, of protecting citizens of the several States, being also citizens of the United States." Congress, in other words, was authorized to enforce all the provisions of the Amendment, not just the prohibitions against the state. Thus Harlan found in the Fourteenth Amendment a nationalization of federal authority broad enough to protect not only the freedman's civil and political rights but his social rights as well.<sup>29</sup>

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<sup>28</sup>Ibid., p. 43.

<sup>29</sup>Ibid., pp. 46, 51-4, 61.

If Harlan's judicial brethren did not join in his expansive reading of the Fourteenth Amendment, they had not entirely forgotten the needs of America's black citizens. The Supreme Court's decision in Ex parte Yarbrough marked a resounding victory in the area of political rights. Jasper Yarbrough and several of his brothers and friends had been convicted in Georgia on two counts of conspiracy to deprive a black citizen in the free exercise of his voting privilege on account of his race. One count was drawn under section six of the First Enforcement Act of 1870 (which had become section 5508 of the Revised Statutes in 1874). The other was drawn from Section two of the Ku Klux Klan Act of 1871 (now Section 5520 of the Revised Statutes) which made it a crime to go in disguise on the public highway. Neither of the laws made any specific reference to actions committed on account of race as stipulated in Reese. Where Reese was concerned with state elections, however, Yarbrough dealt with federal elections. Yarbrough appealed on the grounds that the federal government could not punish private citizens for civil rights violations.<sup>30</sup>

Justice Miller decided--as Judge Bond had stated in the South Carolina Klan cases--that neither the case nor the law depended upon the Fifteenth Amendment which forbid only those denials of the franchise which were on account of

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<sup>30</sup>Charles Fairman, Reconstruction and Reunion, 2: 486-87.

race. Congressional authority to legislate in the area of national elections derived from Article one, section four. "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government," Miller ruled, "It must have the power to protect the elections on which its existence depends from violence and corruption." Thus the federal government had broad powers to protect blacks in federal elections against both private persons and state officials.<sup>31</sup>

Government success in Yarbrough encouraged the Justice Department to continue prosecuting voting rights offenders. Federal statutes dealing with intimidation and fraud at the polls remained on the books, despite the sections of the First Enforcement Act which had fallen in Reese. Federal prosecutors throughout the South continued during the 1870's and 1880's to prosecute cases under the Enforcement Acts. Federal grand juries found true bills, and some of the offenders even stood trial. It had become more difficult to convict, however. Juries were mixed racially, and very few whites were willing to put offenders behind bars merely for keeping blacks from the polls. Those who successfully denied the franchise to black citizens were often regarded as heroes worthy of respect. Thus these cases very often resulted in mistrials. The Supreme Court's favorable ruling

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<sup>31</sup>110 U.S. 651 (1884), 657-58.

in Yarbrough, like the successful convictions in the Ku Klux Klan trials, had failed to bring any lasting change in Southern values. White Southerners were determined, at all costs, to eliminate blacks from the political scene. The "annual autumnal outbursts" of violence remained a constant so long as the blacks retained the franchise.<sup>32</sup>

Initially cautious, the Democratic Government of South Carolina moved within a few years after Redemption to solidify their electoral gains. Fraud was a constant; the stuffing of ballot boxes with tissue ballots sometimes swelled the number of ballots beyond the number of voters. The Democrats passed in 1877 a new election law which separated the box for national office from the box for state and local offices. The two boxes were kept in different places, effectively eliminating federal supervision of the state election. Another innovative election law in 1882 provided for an eight box system in which state and federal ballots were separated, then each election further separated by office. Ballots which were put into the wrong box were eliminated from the count. Democratic election officials shifted the boxes frequently, confusing illiterate voters beyond measure. Voters could ask for assistance in reading the boxes, but the Democratic poll officials were of little help to the unlettered Republicans. The federal district

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<sup>32</sup>For information on federal enforcement efforts after Redemption see Goldman, "A Free Ballot and a Fair Count," *passim*; Nieman, Promises to Keep, 100-01.

attorney for South Carolina estimated that the law effectively disfranchised some 75 percent of the black voters. Violence and intimidation served to discourage many of the others until the official disfranchisement of blacks by the state constitutional convention of 1895 finished the task by stamping out the small remaining percentages of Republican voters.<sup>33</sup>

Thus Reconstruction failed in South Carolina to effect constitutional changes which would protect the freedmen over time in the fundamental rights of citizenship. Impelled by Southern intransigence, the Republican government had passed constitutional amendments so extraordinary they have been considered a second American Constitution. The Enforcement Acts granted unprecedented powers to the national government to intervene in behalf of the freedmen's rights. The federal government mounted in South Carolina a campaign designed to maintain by coercion what white South Carolinians refused to concede. The presence of federal troops, the suspension of habeas corpus, the appointment of a reputedly Radical Republican judge were all designed to force white South Carolina to recognize the inevitable changes wrought by the Civil War. Yet when all was said and done the local values did not budge.

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<sup>33</sup>Cooper, Conservative Regime, p. 94; J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910 (New Haven: Yale University Press, 1974), pp. 45-50, 84-91.

The great South Carolina Ku Klux Klan trials are only one episode in the history of Reconstruction, but they demonstrate in microcosm the reasons why constitutional doctrines and a rule of law sufficient to protect the former slaves in all the rights of citizenship did not emerge. White Southerners had laid down their arms, but they had never changed their minds. Firmly convinced that slavery was the appropriate position for blacks to occupy in society, they determined that whatever freedom meant, it would not substantially alter the condition of the freedmen. To see blacks rise socially and politically threatened the traditional honor of the white South Carolinian and indicated that society itself was falling apart. At all costs, control had to be restored to the traditional governing class--white men of property and education.

The Republican Congress provided constitutional amendments and enforcement laws to secure the rights of those they had freed. But the negative wording and ambiguous phrases of the Reconstruction measures reflected Congress' deep reluctance to disturb the traditional federal-state relations. A broad nationalistic construction was necessary if blacks had any chance to retain those rights. Yet interpretation devolved upon federal judges locked into traditional notions of dual federalism. However much these judges deplored the violence of Reconstruction, they could not bring themselves to declare that the

Reconstruction Amendments had fundamentally altered the nature of the Union. As in the federal circuit court in South Carolina, so in the Supreme Court of the nation, the justices refused to recognize the constitutional revolution inherent in the Fourteenth Amendment.

Constitutions and the laws under them, if they are to govern a people, have to be sanctioned by the majority. Yet the United States as a whole was deeply divided over the authenticity of the Force Acts and the meaning of the Reconstruction Amendments. Not even the Republican Party was united in its resolve to nationalize the fundamental rights of citizenship. Radicals never held a majority in Congress. Democrats, North and South, were firmly convinced that the Fourteenth Amendment was never meant to execute a radical change in the nature of the Union and that the Enforcement Acts seriously exceeded constitutional authority. "The force acts," as a Dunning School historian wrote long ago, "were in fact out of joint with the times. They did not square with the public consciousness either North or South." As the interminable "negro problem" stretched on and on, public opinion capitulated to Southern demand for home rule.<sup>34</sup>

If Southern honor was to yield to Yankee values, the nation would have to maintain a united determination to

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<sup>34</sup>William W. Davis, "The Federal Enforcement Acts," p. 228.

impose permanent change on the recalcitrant South. A president and attorney general who would stand behind the effort to enforce federal rights, a Congress willing to back them up with stiff laws and the money to enforce them, a federal judiciary capable of recognizing changes in the system, and federal troops to keep the peace--these were all necessary if Reconstruction was to work over the long haul. It was not to be. "Even such atrocities as Ku Kluxing do not hold their attention, as long and as earnestly, as we should expect," Attorney General Amos Akerman had written of Northern Republicans in 1871: "The Northern mind being full of what is called progress runs away from the past."<sup>35</sup> The Southern mind on the other hand was deeply rooted in its tradition. The ex-Confederates, although they had lost the War, stood their ground and eventually won exactly the peace settlement they wanted. A permanent establishment of fundamental rights for black citizens was left for a future generation to accomplish.

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<sup>35</sup>Akerman to Benjamin Conley, 28 December 1871, Amos T. Akerman Papers, University of Virginia.

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